

## WEAVING THE ETHICAL TAPESTRY IN THESE CHANGING TIMES – CONTEMPORARY AUSTRALIAN DISCOURSES REGARDING THE ETHICAL OBLIGATIONS OF AUSTRALIAN TAX PRACTITIONERS

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‘Requesting a tax lawyer to discuss the ethics of tax planning will be considered by some as akin to inviting the devil to deliver a sermon on sin. A fresh outlook will be anticipated. At least it will be expected that the statement should be brief.’<sup>1</sup>

### I INTRODUCTION

A tax system embodies a dynamic tension between competing moral imperatives.<sup>2</sup> This dynamism is evident in the current uncertainty regarding the content of Australian ‘tax ethics’. A pivotal debate in the practice of taxation law is whether the obligations of tax practitioners to their clients incorporate consideration of broader issues such as the morality of what is proposed or, as sometimes stated, the interests of society.<sup>3</sup>

For the purposes of this paper, the subject of ‘tax ethics’ reaches beyond professional conduct rules that are legal rules, such as the requirement to act competently,<sup>4</sup> and includes the broader set of norms that a private tax adviser

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1 Philip F Vineberg, ‘The Ethics of Tax Planning’ [1969] *British Tax Review* 31, 31.

2 James S Eustice, ‘Tax Complexity and the Tax Practitioner’ (1989) 45 *Tax Law Review* 7, 12.

3 In this paper ‘ethics’ and ‘morality’ are used interchangeably. The subject of ‘tax ethics’ deals with the ethical considerations associated with work in the field of taxation law. In this sense, tax work embraces participation at all phases of the ‘tax policy cycle’ from the creation of taxation law through administration of that law to any post implementation review (ie, proposals for changes to the law, either by direct submission or participation in professional association(s)) and also representation of clients in any part of the regulatory phase (from proactive ‘consulting’ advice through to litigation). For the purposes of this paper, the ‘mainstream’ construction of a tax adviser’s role will be adopted, and so the consideration of ‘tax ethics’ in this paper will be restricted to a consideration of the tax adviser’s role in the regulatory phase. Different ethical considerations might apply, eg, when tax practitioners participate in confidential consultation with government regarding proposed tax legislation.

4 See, eg, *Tax Agent Services Act 2009* (Cth) s 30-7.

ought to apply when advising clients.<sup>5</sup> As taxation law is a statutory creature, the definition of ‘tax ethics’ requires consideration of the relationship between statute law and ethics. Is law discrete from ethics, such that a tax adviser need merely uphold all relevant laws,<sup>6</sup> or do law and ethics overlap such that a tax adviser must consider ethical norms as part of their tax practice?

This question can be subdivided into several related questions which deal with the identification, interpretation and application of statutory law:

1. is a person obligated to accept and obey a legal rule merely because that rule has been created in accordance with a legal ‘rule of recognition’ authorising that rule as a legal rule?<sup>7</sup> In particular, does the rule of recognition comprise merely formal requirements or does it prescribe moral preconditions for a rule to count as a legal rule?<sup>8</sup>
2. how is the content of any legal rule determined? In particular, is there any discretion with respect to the elaboration of the content of legal rules and, if so, are moral factors relevant to this construction of legal content?; and
3. if moral factors are relevant to the practice of law, whether because moral considerations are relevant to determining the validity of a legal rule or because they are relevant to determining the content of a validated legal rule, is some version of ethical monism or ethical pluralism the appropriate decision making model?

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5 Generally, the literature in this field restricts ‘tax ethics’ to the ethical obligations associated with advisers working in the private sector with respect to the administration of taxation law, the representation of taxpayers in their dealings with the tax administrator, tax litigation and also to the provision of tax services including advice – a point made in Stan Ross and Philip Burgess, *Income Tax: A Critical Analysis* (Law Book, 2<sup>nd</sup> ed, 1991). Whilst for the purposes of this paper reference will be made to the generic concept of a tax adviser or practitioner, it is acknowledged that tax practitioners are an eclectic group comprising advisers with different backgrounds and precise roles. See especially, Justin Dabner, ‘Partners or Combatants: A Comment on the Australian Tax Office’s View of Its Relationship with the Tax Advising Profession’ (2008) 3 *Journal of the Australasian Tax Teachers Association* 76. In private practice, the main dichotomy is between tax accountants and tax lawyers. The essentially adversarial and advocacy nature of legal practice more readily leads to the proposition that a lawyer owes undivided loyalty to their client. On the other hand, the compliance function commonly undertaken by many accountants implies that they tend to act much more as intermediaries seeking to facilitate their client’s interaction with the Government. On this, see James Andreoni, Brian Erard and Jonathan Feinstein, ‘Tax Compliance’ (1998) 36 *Journal of Economic Literature* 818. In fact, given the background role of accountants in certifying financial statements (in which role accountants must act independently of and sometimes even adversely to the interests of their client) it is conceivable that they may be more readily prepared to adopt a more judicious role between their client and the Australian Taxation Office (‘ATO’).

6 This would include the Code of Professional Conduct set out in sub-div 30-A of the *Tax Agent Services Act 2009* (Cth) and any other legal rule (ie, for lawyers, the code of professional conduct incorporated by reference in s 585 of the Model Legal Conduct rules – see, eg, *Legal Profession Act 2006* (ACT) s 585.

7 The phrase ‘rule of recognition’ is attributed to H L A Hart, *The Concept of Law*, (Clarendon Press, 2<sup>nd</sup> ed, 1994) 94. Earlier, Hans Kelsen had developed the concept of the *grundnorm*: Hans Kelsen, *Introduction to the Problems of Legal Theory* (Bonnie Litschewski Paulson and Stanley L Paulson trans, Clarendon Press, 1992) [trans of: *Reine Rechtslehre* (first published 1934)].

8 If so, enforcement of this principle might mean that unelected judges would have the power of overriding law made by elected parliamentarians.

Three approaches in response to these questions are evident in the literature regarding Australian tax ethics.

The first approach holds that ethics are irrelevant to tax practice to the extent that they are not embodied within the law because we ought to adhere to a positivist model of law. Legal positivism holds that the authority of law derives from the fact that it is posited in accordance with a community's 'rule of recognition' – those requirements that must be satisfied for a norm to be recognised as a *legal* norm. As with any label, 'positivism' must be used cautiously because there are different strands of positivism.

According to 'thin positivism', the rule of recognition is restricted to manner and form requirements necessary to preserve democratic accountability, rather than compliance with ethical norms. Thus, the legitimacy of the law, and hence the foundation of maintaining social order, is assured.<sup>9</sup> Most importantly, thin positivists do not accept that the rule of recognition imports any moral criteria.<sup>10</sup> A thin positivist accepts that a valid law may import moral elements but does not accept that the validity of that law itself depends upon satisfaction of moral criteria.

By contrast, 'thick' or 'inclusive' positivism holds that the rule of recognition may import moral criteria. The debate between thin and thick positivism is central to the question of whether law is subject to moral constraints and hence to the role of the courts, and of advisers, in identifying the law. If the rule of recognition imports moral criteria, do unelected judges apply their construction of a society's moral norms in determining the status of a rule that has been created by a democratically elected legislature?<sup>11</sup>

The Australian Commissioner of Taxation, Michael D'Ascenzo, appears to adopt a thin positivist stance. He observes that we live in a rule of law country<sup>12</sup> and he accepts that this is consistent with legal rules incorporating ethical elements such as a tax agent's obligation to act honestly and with integrity.<sup>13</sup> Similarly, the 'ethical responsibilities' of tax administrators are confined to Australian Public Service norms.<sup>14</sup> Although he appears to acknowledge the possibility of legal indeterminacy,<sup>15</sup> it seems more likely that the Commissioner accepts that tax law has a determinate meaning comprising the legislative

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9 Jeffrey Goldsworthy, 'Legal Intentions, Legislative Supremacy, and Legal Positivism' (2005) 42 *San Diego Law Review* 493. In the context of Australian taxation see, eg, Michael Carmody, 'Ethics and Taxation' (Speech delivered at the Edmund Rice Business Ethics Forum, Sydney, 28 October 1999).

10 Joseph Raz, 'Authority, Law, and Morality' in Joseph Raz (ed), *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Clarendon Press, 1994) 194.

11 There is a vast body of literature upon this point. See, eg, Michael C Dorf, 'Legal Indeterminacy and Institutional Design' (2003) 78 *New York University Law Review* 875.

12 Michael D'Ascenzo, 'The Rule of Law: A Corporate Value' (Speech delivered at the Law Council of Australia Rule of Law Conference, Brisbane, 1 September 2007).

13 *Tax Agent Services Act 2009* (Cth) s 30.10(1).

14 Michael D'Ascenzo, 'Do Professionals Have an Ethical Compass and Does It Matter?' (Speech delivered to Victorian Bar Association, Melbourne, 29 March 2007). See, eg, ATO, *Conduct of Tax Office Litigation*, PS LA 2009/9, 6 September 2010 which sets out the Australian Taxation Office's approach to tax litigation.

15 D'Ascenzo, 'The Rule of Law: A Corporate Value', above n 12.

intention, even if that intention may be difficult to ascertain.<sup>16</sup> If this interpretation of the Commissioner's statements is correct, according to his view there is no room for ethics in taxation law. The 'ethical' obligations of tax practice are restricted to legal obligations and constructing the determinate meaning of those legal obligations is non-discretionary such that a tax practitioner's ethics, or a community's ethics, are irrelevant to how they go about identifying the law. As such, taxes may be the price we pay for civilised society,<sup>17</sup> but 'the payment of tax is a matter of law (and not of morals)'.<sup>18</sup>

The second approach is that ethics are relevant to tax practice, but only because the entire body of legal rules incorporates moral principles such as fairness and efficiency, so the application of the tax law requires application of these ethical imperatives as part of the process of identifying the law. This means that a tax practitioner must go beyond the legislative intention of a particular rule in identifying the interpretation of the rule that best fits it within the overall scheme of principle embodied in the body of law. This approach is consistent with modern versions of 'natural law'<sup>19</sup> or, in some jurisdictions that have adopted substantive rights within constitutional Charters, with inclusive positivism.<sup>20</sup> On this view the law ought to be interpreted 'ethically' – in accordance with the ethical principles embodied in the entire legal system – by tax advisers.<sup>21</sup> In some cases, this may mean that the 'right' interpretation of the rule contradicts the legislative intention with regard to that rule.<sup>22</sup>

The nature of the ethical imperatives embodied within the body of law, and their relative significance, is contested. Moreover, whether the ethical imperatives within the statutory fabric are conducive to 'right' legal answers<sup>23</sup> or legal dissonance is also contested.<sup>24</sup>

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16 Michael D'Ascenzo, 'Along the Road to Damascus: Framework for Interpreting the Tax Law' (2000) 3 *Journal of Australian Taxation* 384.

17 *Compañía General de Tabacos de Filipinas v Collector of Internal Revenue*, 275 US 87, 100 (Wendell Holmes J) (1927). For critical discussion of this comment, see Louis Eisenstein, *The Ideologies of Taxation* (Ronald Press, 1961) 5.

18 Michael D'Ascenzo, 'Cultural Shifts in Thinking? What If?' (Speech delivered at the Allens Arthur Robinson Dinner, 7 September 2006).

19 Ronald Dworkin's work has been described as a modern interpretation of natural law theory. Natural law theory originally considered that a rule which purported to be a law was truly a law because it embodied divine principles of justice. Post Enlightenment, natural law theory proposed that a norm is valid law if it complies with universal ie, rational moral principles. Ronald Dworkin finds such principles within the fabric of the law of modern, common law countries such as the United States of America, the United Kingdom and presumably Australia.

20 See David Dyzenhaus, 'The Justice of the Common Law: Judges, Democracy and the Limits of the Rule of Law' in Cheryl Saunders and Katherine Le Roy (eds), *The Rule of Law* (Federation Press, 2003) 21, 31. Given the nature of the Australian Constitution, it is doubtful that inclusive positivism can be sustained in the Australian context: see Adrienne Stone, 'Australia's Constitutional Rights and the Problem of Interpretive Disagreement' (2005) 27 *Sydney Law Review* 29.

21 John Braithwaite, *Markets in Vice, Markets in Virtue* (Oxford University Press, 2005); D'Ascenzo, 'Do Professionals Have an Ethical Compass and Does It Matter?', above n 14.

22 Ronald Dworkin, *Law's Empire* (Belknap Press of Harvard University, 1986).

23 *Ibid.*

24 See, eg, Dorf, above n 11, 898.

The final approach holds that ethics are relevant to tax practice because ethics are pre-eminent. This is because the decision to apply and/or comply with any law, including statute law, is ultimately an ethical decision and there are ethical norms that are not legal norms.<sup>25</sup> Thus, McBarnett argues that compliance with the letter of the law can be unethical, while compliance with the substance of the law, however that might be determined, is ethical.<sup>26</sup>

Whether ethical principles indicate a universally 'right' ethical outcome ('moral objectivity') or whether the application of ethical principles is context-dependent ('ethical relativism') is contested.<sup>27</sup>

From a practical perspective, resolution of these questions is extremely significant. The operation of a tax system hinges upon ethical choices, implicitly or explicitly made, by participants in the field. These choices are informed by one's ethical stance regarding legislation. Whether to evade tax (out of self-interest or as a matter of conscience),<sup>28</sup> whether altruistically to pay more tax than one need necessarily pay, whether to interpret uncertain taxation law in favour of the taxpayer or in favour of the revenue and whether actively to seek constructions of the law that favour the client (in private practice) or the revenue (for tax administrators) are just some examples of choices made in the field of taxation work and that have an ethical facet to them.

Tax ethics, broadly defined, are fundamental to our daily tax practice and yet there is little evidence to suggest that overt consideration of ethical issues is commensurate with the importance of the subject.<sup>29</sup> A review of the scant Australian literature regarding 'tax ethics' indicates that this 'soft law' subject is marginalised, treated as 'outside the law' and hence a topic of idle academic conversation rather than something that will trouble the tax practitioner going about their professional work.<sup>30</sup> When judging, judges do not explicitly assess the ethical merits of possible outcomes,<sup>31</sup> and nor are ethical matters expressly addressed in their secondary consideration of the technical process of identifying 'the law',<sup>32</sup> so it is assumed that ethics are irrelevant to passing judgment upon

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25 See, eg, David Luban, 'Reason and Passion in Legal Ethics' (1999) 51 *Stanford Law Review* 873.

26 Doreen McBarnett, 'When Compliance is Not the Solution but the Problem: From Changes in Law to Changes in Attitude' in Valerie Braithwaite (ed), *Taxing Democracy: Understanding Tax Avoidance and Evasion* (Ashgate, 2003) 229.

27 Gilbert Harman and Judith Jarvis Thomson, *Moral Relativism and Moral Objectivity* (Blackwell, 1996).

28 Marjorie E Kornhauser, 'For God and Country: Taxing Conscience' [1999] *Wisconsin Law Review* 939.

29 In the absence of quantitative data on this point, for the present it must be assumed that the degree to which the subject of tax ethics is overtly considered corresponds with the degree to which tax ethics is considered out of the public view.

30 In the context of the United Kingdom and Ireland, the contrast between the burgeoning literature upon accounting ethics and the scant literature upon tax ethics has been noted: Elaine Doyle et al, 'Equating Ethics and Risk Management in Taxation: Evidence from an Exploratory Study in Ireland and the UK' (Paper presented at the 16<sup>th</sup> Tax Research Network Conference, University of Sheffield, 6–7 September 2007) 2.

31 Neil Brooks, 'The Role of the Judges' in Graeme S Cooper (ed), *Tax Avoidance and the Rule of Law* (IBFD, 1997) 95.

32 See, eg, Michelle Gordon, 'Trends in Tax Advice and Litigation – What to Do When It All Turns on a Word or Two' (2009) 38 *Australian Tax Review* 202.

the application of tax law. Tax textbooks routinely ignore the subject, or pay it scant regard, indicating that tax teachers have not pressed for inclusion of this material in the textbooks because they do not address the subject in any depth when teaching their courses.<sup>33</sup> Meanwhile, as already noted, the Commissioner of Taxation adopts a circumscribed field of ‘tax ethics’ that restricts ‘ethics’ to law.<sup>34</sup>

Why is a subject so fundamental to the practice of taxation so notable by its insignificance within the discourse of tax? The argument presented in this paper is that reinvigorating tax ethics would necessitate a fundamental reconsideration of the positivist Australian construction of what counts as law and hence of the process of applying law. Embarking upon ‘ethical tax practice’ would entail consideration of incredibly complex questions that, at best, give rise to incredibly context dependent answers. No one case is like another and there could not be easy answers. The paper argues that, faced with this Herculean task,<sup>35</sup> it is understandable that participants in the tax domain seek refuge in a thin positivist stance which promises a simple path to right answers and thereby makes daily tax practice financially and emotionally viable.

But the mainstream thin positivist stance is but one of at least several possible ‘closure myths’ that might be drawn upon in enabling a tax practitioner to go about their daily work. For example, a practitioner might pursue their perception of moral virtue when engaging in tax work, confident that their moral sensibility is finely attuned.<sup>36</sup> The paper therefore seeks to explain why the contingent thin positivist account has come to be accepted as the ‘common sense’ understanding of the interaction of tax law and ethics. The article argues that this positivist account of the tax law is taken as an article of faith<sup>37</sup> because it integrates with institutional, ideological and material factors in such a way as to make it natural to exclude ethical considerations (broadly, not narrowly, defined) from the operation of a tax system. The paper concludes by noting that the contingency of legal positivism means that it may be toppled from its throne, but that there are considerable hurdles confronting those that hope for a new ethical approach to tax practice.

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33 A similar phenomenon has been noted in a jurisdiction where positivism is weaker: Edward Rubin, ‘What’s Wrong with Langdell’s Method, and What to Do about It’ (2007) 60 *Vanderbilt Law Review* 609.

34 D’Ascenzo, ‘The Rule of Law: A Corporate Value’, above n 12.

35 Dworkin, above n 22, 265. Dworkin adopts a constrained natural law theory by suggesting that a judge would only consider moral principles to the extent that they were embedded within the law. Even so, Dworkin concedes that such a task would be beyond the capability of a ‘real’ judge, and hence his adoption of ‘Hercules’ as his mythical judge.

36 Luban, above n 25.

37 For a critical discussion of the concept of faith in the context of lawyers’ commitment to and portrayal of ‘the law’ see: Steven D Smith, ‘Believing Like a Lawyer’ (1999) 40 *Boston College Law Review* 1041.

## II METHODOLOGY AND DEFINITIONAL ASPECTS

### A Taking a Sceptical Perspective

By addressing the Australian social practice of ‘ethics talk’ this article differs from much of the literature in the field because this article does not advocate a particular normative approach to ‘ethical practice’ in the tax realm.<sup>38</sup> Taking this sociological tack to the consideration of tax ethics, the paper locates the discourses regarding the interaction of professional ethics and taxation law in the Australian context with the object of understanding how these discursive threads have been constructed and why they might gain traction in the Australian community.<sup>39</sup> The subject of this paper, then, is as much about the content of the various ethical stances propounded by various commentators as it is about the social factors which validate those stances (at least in the eyes of perhaps overlapping and substantial segments of the community). Thus, this paper is not a normative paper. Rather it offers theoretical speculation as to why the mainstream Australian approach to the subject of tax ethics is framed in a particular way. The paper is therefore a precursor to empirical study of the attitudes of tax practitioners to tax ethics.

One reason for this sociological approach, as distinct from the normative approach adopted by others,<sup>40</sup> is that the paper adopts a sceptical standpoint regarding the possibility of objectively differentiating ‘right’ from ‘wrong’ norms at the social level. The starting point for this paper is the proposition that tax ethics is a dynamic discursive field in which myriad incommensurable ideological, instrumental, institutional, historical and material factors influence and are advanced by individual participants in this domain. The infinite combinations of these factors, and the subjective weighing of elements within each factor, destabilise the integrity with which any individual can speak across different points in time.<sup>41</sup> This means that a person’s formulation of ‘ethical behaviour’ is deeply context specific. In other words, the authors are moral relativists who subscribe to the view that *at best* a claim is only morally ‘right’ with reference to a particular context, and that context is specific to the particular

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38 Cynthia Coleman and Barbara Mescher, ‘Ethics: An Important Consideration’ in Margaret McKerchar and Michael Walpole (eds), *Further Global Challenges in Tax Administration* (Fiscal Publications, 2006) 135.

39 This is a descriptive paper but one which draws heavily from the ‘sceptical’ line of philosophical inquiry – the psychoanalytic work of Lacan, Foucauldian governmentality and the language theory of deconstruction and rhetoric. However, such philosophy is left intentionally in the background because it is the practice of constructing the law/ethics interface adopted by discursive participants, and the practical implications that those participants propose, that are the foci of this paper. It might be suggested that this is a clever rhetorical ploy – claiming a ‘sceptical’ heritage whilst leaving scepticism regarding truth claims (an essential aspect of any descriptive account) in the background.

40 See, eg, Coleman and Mescher, above n 38.

41 Herbert A Simon, ‘A Behavioral Model of Rational Choice’ (1955) 69 *Quarterly Journal of Economics* 99.

characteristics of, and circumstances encountered by, a particular individual at a particular time.<sup>42</sup>

From this standpoint of moral relativism ethical practice cannot mean simple compliance with universal ethical norms or compliance with a finite set of professional or public service rules.<sup>43</sup> Nor can it mean compliance with a set of stable and determinate personal values that indicate the ‘right’ ethical outcome in any particular case. In some contexts an individual may conclude that it is ethical to evade taxation while in other contexts the same individual may be repulsed by the very thought of engaging in tax evasion. If taken as seriously as we believe ethical practice should be, a relativist ethical stance entails a far deeper appraisal of the nuances of any particular situation than the ‘ethical slide rule’ approach that moral objectivity might be taken to imply. Even if one accepts the core proposition of a strong version of moral objectivity – that moral problems can be resolved with ‘right’ answers that are not context dependent – the task of weighing competing ethical imperatives with the object of discovering the objectively right ethical answer truly would be Herculean. It is doubtful that one could ever feel confident that they had arrived at the right answer. Rather than generating closure, the ethical field engenders open-ended, context specific deliberation. It is little wonder, then, that tax practitioners seek sanctuary in ‘closure myths’ – discursive themes that offer ready(ier) resolution of the ethical complexity in which they are embroiled. A practitioner might contemplate diving through the whirling ethical blades of incommensurable imperatives, but step back and reassuringly remind themselves of the certainty of (of all things) taxation law and their role of discovering that law irrespective of the moral consequences of their conclusion.

## **B Significance of a Sceptical Viewpoint**

‘So what?’, the reader might ask, ‘why does this sceptical, sociological account of tax ethics matter in the hard, practical world of taxation law?’ There are several consequences that flow from adoption of the sceptical account of tax ethics proposed in this paper. These consequences will be elaborated in the course of this paper, but at this point suffice it to say:

1. that a sceptical account of tax ethics promises a deeper experiential understanding of professional tax ethics – an account of the conflicting ethical imperatives that practitioners ‘at the coalface’ must reconcile in their daily work. By their nature, many normative accounts miss this empirical aspect;
2. literature dealing with tax ethics often assumes that a tax practitioner is a rational autonomous agent – the quintessential ‘free agent’ of modern liberal theory – and hence has it within their power unilaterally to choose between various ethical approaches;

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42 For a discussion of differing forms of moral scepticism see: Harman and Thomson, above n 27, 3.

43 As suggested, eg, by D’Ascenzo, ‘The Rule of Law: A Corporate Value’, above n 12.



Rather than assuming this autonomy, scepticism invites consideration of environmental factors that shape what may appear to be rational ethical reflection.<sup>44</sup> This sociological approach to a consideration of tax ethics suggests a more complex model of power by locating the tax practitioner within a particular social context, and identifies some of the more important factors that shape and constrain the practitioner's *contingent* ethical outlook.<sup>45</sup> The sociological approach to tax ethics adopted in this paper therefore shows how, at least in some contexts, a practitioner's ethical 'decisions' have in a sense been made for them by virtue of the social context in which the practitioner finds themselves.<sup>46</sup> The concept of hegemony captures the idea that individuals are both born into a contingent social construct and also shape that contingent social construct by interacting with it and modifying it as 'free' agents.<sup>47</sup>

3. by focusing upon discursive practice rather than a normative ethical model, this sceptical approach highlights the rhetorical devices consciously and subconsciously adopted by participants in the contemporary Australian discourse regarding tax ethics and explains why those rhetorical devices resonate with the Australian community (and the participant) such that particular ethical approaches appear 'natural' or 'commonsensical';
4. understanding the rhetorical devices that underpin differing ethical propositions also assists us to appreciate the dynamism within the ethical field. For example, scepticism prompts reflection upon the naming of 'compliant non-compliers'<sup>48</sup> and 'aggressive tax planning'<sup>49</sup> because such labelling carries manifold assumptions regarding the context in which such ethical assessments are made; and
5. by locating professional ethics within a particular social context, this descriptive model of ethical practice also speaks to those who advocate particular normative ethical approaches by suggesting that shaping professional ethics may be more complicated than merely enunciating a particular ethical view in the hope that it will attract broad practitioner support. This essentially idealist approach ignores the material, instrumental and institutional factors that also shape ethical practice, to which attention must also be paid when advocating a 'new' approach to professional ethics.

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44 Simon, above n 41.

45 Steven Lukes, *Power: A Radical View* (Palgrave Macmillan, 2<sup>nd</sup> ed, 2005).

46 Cf Max Weber's suggestion that sociology only concerns itself with purposive, as opposed to unthinking, automatic or reflexive action: Max Weber, *Economy and Society*, (Ephraim Fischhoff trans, University of California Press, 1978) 4 ff [trans of: *Wirtschaft und Gesellschaft* (first published 1925)].

47 Ernesto Laclau and Chantal Mouffe, *Hegemony and Socialist Strategy* (Verso, 2<sup>nd</sup> ed, 2005) xi.

48 McBarnet, above n 26.

49 Assuming that such 'aggressive tax planning' is accepted to be within the law: cf Braithwaite, above n 21, 16 (defining aggressive tax planning as arrangements that fall within the scope of *Income Tax Assessment Act 1936* (Cth) ('ITAA36') Pt IVA).

### III APPROACHES TO TAX ETHICS

The contemporary tax ethics literature identifies three ideal types<sup>50</sup> with regard to the practice of taxation law – the ‘client centred approach’, the ‘responsible adviser’ approach and the ‘moral activist’ approach.

The purposes of this part are:

1. to show that discussions of private professional ethics typically adopt the positivist segregation of law from ethics, as they depict professional advisers as either operating within the law or choosing to follow their ethical compass irrespective of the law;<sup>51</sup>
2. to show that, despite this portrayal of the separation of law from ethics, each approach posits the existence of choice as to how the law is identified and applied and this choice is founded upon grounds that do not pass the positivist’s rule of recognition test. The existence of this extra-legal choice indicates that tax practitioners acknowledge that ethics and law are intermingled rather than separate, and so legal positivism fails as a descriptive account of professional tax practice; and
3. to describe the sociological factors that legitimises each ethical approach.

#### A The Client Centred Approach

##### 1 *A Description of the Client Centred Approach*

One ethical stance has been called the ‘client centred’ or ‘zealous advocate’ approach,<sup>52</sup> but such descriptors should be used with some caution.<sup>53</sup> Again, categorisation of practitioners under this label must be sensitive to individual variations of the ‘client centred’ concept.

However, the archetypical client centred adviser perceives taxation to be the price paid for publicly provided goods and services under a social contract. As with any exchange contract, it is said, the *contra proferentem* rule supports a

50 The discussion of ideal types carries the usual caveats regarding the artificiality of such extractions from real social practice, but is useful in isolating particular components of what is commonly a far more complicated social reality: Max Weber, above n 46, 20–2.

51 Christine Parker and Adrian Evans, *Inside Lawyers’ Ethics* (Cambridge University Press, 1<sup>st</sup> ed, 2007) 6. Parker and Evans treat the ‘client centred’ approach and ‘moral activism’ as discrete categories, whereas for reasons set out in the text of this paper, we believe that the ‘client centred’ and moral activist approaches are subsets of moral activism.

52 Lord Brougham’s speech in the House of Lords during the trial of Queen Caroline captures this client centred view, stating that ‘an advocate, by the sacred duty which he owes his client, knows in the discharge of that office but one person in the world, that client and none other’: Deborah L Rhode, ‘An Adversarial Exchange on Adversarial Ethics: Text, Subtext, and Context’ (1991) 41 *Journal of Legal Education* 29.

53 If taken out of context, ‘client centred’ might be taken to suggest that a tax adviser is a mere puppet for their client – to the point that they do their client’s bidding even where this entails breaking the law. Somewhat differently but in the same vein, the ‘zealous advocate’ nomenclature used by some might be taken to suggest an adviser too readily assumes that tenuous but possible constructions of the tax law are ‘the law’ without offering any risk assessment to the client.

narrow construction of the contract.<sup>54</sup> This may mean that an adviser identifies and exploits provisions in the tax law that advance the client's interests, or that the adviser proactively manipulates transactions so as to minimise the tax payable, and that the adviser identifies and avoids structural weaknesses or pitfalls that disadvantage the client. Such advisers operate along a spectrum from a bland compliance with the rules as they interpret them at one end to an aggressive pursuit of the client's interests at the other that may even see the adviser operate outside the parameters of the law.<sup>55</sup>

As a mere mouthpiece for the law in the service of the client's interest, the practitioner is under no obligation to canvass the moral foundation of the advice nor to consider whether acting in furtherance of the advice is consistent with the policy of the legislation, preserving relationships or in the interests of society.<sup>56</sup>

## 2 Expressions of the Client Centred View

The client centred view was adopted in 1994 by the Taxation Institute of Australia's then President who opined that the sole responsibility of the tax professional is to their client and if anyone has a duty to the community in regard to tax it is the taxpayer. Any duty the professional owes to the community is performed by discharging their responsibilities to their clients.<sup>57</sup> In *Bayer v Balkin*, Cohen J observed:

It may once have been considered that it was the duty of citizens and residents of a country to make their proper contribution to the revenue so as to enable the government to run the country for the benefit of its inhabitants. It now seems to be accepted, with the imposition of high rates of tax upon those who are most able to contribute to that revenue, that there is a duty on persons such as accountants and solicitors to advise their clients how they can avoid, as far as possible, making what the government regards as a proper contribution. That duty to advise has not been contested in these proceedings.<sup>58</sup>

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54 Terry Dwyer, "'Purposive' Interpretation of Taxing Statutes – A Critical Comment" (2010) 39 *Australian Tax Review* 61, 64.

55 A particularly egregious example of such behaviour being evident in *Zelino v Budai* (2001) 47 ATR 488.

56 James O Urmson, 'Saints and Heroes' in Abraham I Melden (ed), *Essays in Moral Philosophy* (University of Washington Press, 1958). Under this approach it is not the domain of tax practitioners to preach to their clients on moral issues rather than is best left to saints. See also Christine Parker, 'Regulation of the Ethics of Australian Legal Practice: Autonomy and Responsiveness' (2002) 25 *University of New South Wales Law Journal* 676, 678–9.

57 David Russell, 'The Client's Interests Always Take Priority' (1994) 28 *Taxation in Australia* 431. See also, A J Myers, 'Tax Advice: The Lawyer's Ethical Responsibility' (1990) 19 *Australian Tax Review* 80; Dwyer, above n 54, 61. At least one New Zealand tax practitioner does not believe that it is in the domain of a tax adviser to consider the morality of a transaction: David Simcock, 'The Tax Professional: Responsibilities and Exposures' (1994) 28 *Taxation in Australia* 549.

58 (1995) 31 ATR 295, 305.

These observations seem to reflect a widely held acceptance of the client centred stance. Surveys of both New Zealand<sup>59</sup> and Western Australian tax practitioners<sup>60</sup> in the mid-1990s confirmed that few acknowledged a duty to the taxing authority or, indeed, to act in the public interest.<sup>61</sup>

This client centred view is reflected today in the ethical rules of the accounting and legal bodies both within Australia and New Zealand.<sup>62</sup> Even the code of professional conduct contained in section 30-10 of the *Tax Agents Services Act 2009* (Cth) takes, at least on the face of it, the traditional client centred position. This code contains an obligation to act with honesty and integrity and to not knowingly obstruct the proper administration of the taxation laws and also states that a tax agent must act ‘lawfully’ in the best interests of their client.<sup>63</sup>

The Explanatory Memorandum to the legislation containing the code does, however, leave the door ajar to tempering a tax agent’s client centred focus. Paragraph 3.33 reads:

As tax agents and BAS agents are agents of their clients, they must act in the best interests of their clients. However, tax agents and BAS agents also operate as an intermediary between taxpayers and the tax administration and therefore owe duties not only to their clients but also to the community. As such, their obligations to their clients must be subject to the law.<sup>64</sup>

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59 Rebecca L Attwell and Adrian J Sawyer, ‘The Ethical Attitudes of New Zealand Tax Practitioners – Still “Barely Passing”?’ (2001) 7 *New Zealand Journal of Taxation Law and Policy* 111, 128–9, reporting a similar finding to Stuart T Tooley, ‘Tax Practitioners: Towards an Understanding of Ethical Problems and Attitudes in Taxation’ (Paper presented at the AAANZ Annual Conference, Palmerston North, New Zealand, July 1992).

60 Rex L Marshall, Robert W Armstrong and Malcolm Smith, ‘The Ethical Environment of Tax Practitioners: Western Australian Evidence’ (1998) 17 *Journal of Business Ethics* 1265, 1273.

61 This is notwithstanding evidence that a majority of taxpayers look for a tax agent who is low risk and focuses on ‘doing the right thing’: Yuka Sakurai and Valerie Braithwaite, ‘Taxpayers’ Perceptions of Practitioners: Finding One Who Is Effective and Does the Right Thing?’ (2003) 46 *Journal of Business Ethics* 375.

62 Whilst the accounting and legal profession are subject to professional standards these are typically open-ended and subject to interpretation in practice. See, eg, Institute of Chartered Accountants in Australia, *APES 110: Code of Ethics for Professional Accountants* (at 15 February 2008) [7.6]. It also mandates that a client’s failure to disclose should cause the member to reconsider their engagement. Similarly [5.4] provides that members should not promote or encourage tax schemes. Potentially of significance is [3.2] that provides that members shall observe and comply with their public interest obligations when they provide taxation services: Accounting Professional and Ethical Standards Board, *APES 220 Taxation Services* (at October 2007). Certainly the New Zealand Law Society ethical rules would appear to confirm the view that there is no obligation to the tax system: see *Lawyers and Conveyancers (Lawyers: Conduct and Client Care) Rules 2008* (NZ) <<http://www.legislation.govt.nz/regulation/public/2008/0214/latest/DLM1437811.html>> especially chapters 5 and 6. See also the *Code of Ethics* of the New Zealand Institute of Chartered Accountants which merely imposes on members the need to maintain integrity, objectivity and independence: New Zealand Institute of Chartered Accountants, *Code of Ethics* (at June 2003). However, where a member has a right to disclose, but not a duty to do so, the rules do encourage consideration of the public interest in determining whether to make the disclosure: at [118]. Thus these rules may provide a stronger base than the Australian equivalent for asserting that Institute members do owe some, albeit limited, duty to the Inland Revenue Department/tax system.

63 See *Tax Agent Services Act 2009* (Cth) s 30.10(4).

64 Explanatory Memorandum, *Tax Agent Services Bill 2008* (Cth) 54 [3.33].

Note, however, that the reference to ‘duties to the community’ appears to be undermined by the following sentence, which suggests that those duties are limited to merely applying the law. Thus, there is ambiguity as to whether the code merely restates the traditional view or is suggesting an alternative view that tax agents have ethical obligations to consider the interests of the community.<sup>65</sup>

### 3 *The Ethical Basis of the Client Centred View*

The client centred view adopts a positivist façade by stating that the *legal* requirement to ‘act lawfully in the best interests of the client’ means that the role of an adviser is to apply the, presumably determinate, law as they find it with a view to minimising the client’s pecuniary contribution to the state. However, this positivist facade ignores the ethical foundations of the client centred approach.

Under the client centred view, the requirement to act in the best interests of the client is interpreted in a restrictive way by limiting ‘the interests of the client’ to minimising the pecuniary price paid under the social contract. There is no positive legal rule that requires this approach. The client centred approach therefore elides the debate regarding the proper approach to statutory interpretation by assuming that a ‘narrow’ construction of the law is the right approach to statutory interpretation. That debate incorporates a range of ethical factors – political, pragmatic and moral.<sup>66</sup> Alternate interpretations of ‘the interests of the client’, perhaps framed less in terms of pecuniary self-interest and more in terms of moral fulfilment arising from making a positive contribution to the community, are ignored. Rather than being grounded upon a posited fact, the client centred view pursues a particular ethical vision of the nature of law and the role of advisers in the implementation of that law.

Moreover, the client centred view maintains that the determinacy of law means that there is no discretion in ascertaining what the law is. On this view, for example, the meanings of ‘best interests of the client’ and of any particular tax law are determinate. Thus, it is said, there can be no ethical aspect to professional practice. However, if the law is determinate, how is it that there can be such disagreement about what the law is in a particular case and even about the method of correctly identifying the law? Judicial decisions upon the interpretation and application of taxation law are frequently overturned on appeal without any suggestion of incompetence on the part of the lower court judge(s). This suggests that there are legitimate disagreements about how the meaning of law is to be ascertained in any particular case – that law is of indeterminate meaning. Judges disagree about the correct path to discovering the right

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65 This ambiguity was acknowledged in an article based on the exposure draft to the legislation which also formed the basis of a submission pursuant to the Government’s consultative processes. Given that the issue was not addressed one inference is that the ambiguity is intentional. See Justin Dabner, ‘Beware the Pirates’ Code’ (2007) 26 *Australian Tax Week* [¶ 568].

66 Dwyer, above n 54.

interpretive answer<sup>67</sup> and judicial approaches to statutory interpretation have changed over time.<sup>68</sup> Further, jurists acknowledge interpretive uncertainty either as an unavoidable fact or else they seek to exclude the possibility by artificially constraining the interpretive frame.<sup>69</sup>

Whilst conventional wisdom differentiates the client centred adviser (and, indeed, the responsible adviser) from the moral activist discussed later in this paper we suggest that the client centred adviser (and responsible adviser) is, in fact, a particular category of moral activist. Despite such an adviser's purported adherence to 'the law', the practitioner actively pursues a particular ethical outlook, being the minimisation of a client's tax liability by 'lawful' means. Rather than the client centred adviser being a rule applier, the indeterminacy of law creates a field of discretion upon which the client centred adviser can pursue this particular ethical approach.

#### **4 *The Significance of Legal Positivism within the Sociological Factors That Shape and Sustain the Client Centred Approach***

This client centred brand of moral activism gains traction within the Australian community because it can be constructed in a way that draws together several powerful discursive themes in a rhetorically convincing fashion.

##### *(a) Liberal Individualism*

A liberal individualist stance affords a strong foundation for the role of client centred adviser. One strand of liberal political theory holds that the state is a necessary evil as it is required to prevent a war of 'all against all', but simultaneously the state embodies the evil of constraining the freedom of the individual.<sup>70</sup> For those who hold that the state exhibits a natural tendency to encroach upon individual freedom,<sup>71</sup> minimising the tax revenue flowing to the state is one means of promoting their conception of the ideal constitution. Typically, such accounts depict the might of the state wielded against the limited resources of the individual, a rhetorical device which tends to downplay the counterbalancing factors such as the asymmetry of access to relevant

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67 In *Federal Commissioner of Taxation v Hart* (2004) 217 CLR 216, Gummow and Hayne JJ adopted a narrow approach to interpreting the statutory definition of 'scheme' while Gleeson CJ and McHugh J adopted a more contextual approach to identifying the legislative purpose.

68 Graham Hill, 'How Is Tax to Be Understood by Courts' (2001) 4 *Tax Specialist* 226; Mark Burton, 'Reconciling the Rhetoric of Rights with the Pro Revenue Construction of Tax Legislation in Eighteenth Century Britain' (2003) 7 *Canberra Law Review* 27.

69 See, eg, Goldsworthy, 'Legal Intentions, Legislative Supremacy and Legal Positivism', above n 9. He suggests that the legislative purpose should be in accordance with what a lawyer would conceive that purpose to be. Paradoxically, as a positivist Goldsworthy cannot point to a legal rule that dictates this approach.

70 A different strand of liberal political theory holds a more benign view of the state, seeing it as the mechanism by which individuals fulfil their capacity to live the good life by, eg, ensuring that each individual receives a good education that enables them to make informed choices about the good life.

71 See, eg, the critique of the Australian welfare state, such as it is, published by the Centre for Independent Studies: Centre for Independent Studies, Welfare State <<http://www.cis.org.au/research/ideas-about-liberty>>.

information<sup>72</sup> and which also ignores some of the institutional limitations upon government.<sup>73</sup>

Similarly, some do not accept that the liberal state is capable of creating a neutral legal order under which moral pluralism may flourish and/or consider that the state has not succeeded in creating a neutral legal order.<sup>74</sup> For these groups it may seem appropriate to redress the state's wrongs by actively seeking compensating tax advantages as a zealous advocate of victims of such state discrimination.<sup>75</sup>

Thus, although the 'Duke of Westminster' approach<sup>76</sup> to tax interpretation has been circumscribed by statutory intervention<sup>77</sup> and judicial comment,<sup>78</sup> a strong low tax/small state discursive thread remains within the Australian community and is reflected in Australia's comparatively low levels of taxation.<sup>79</sup> According to this thread, it is ethically justifiable for a practitioner to assist their clients in maximising their individual freedom (in the form of market power) or righting the state's moral turpitude by minimising the client's tax payments.<sup>80</sup>

### (b) *Distrust of Government*

The client centred view is bolstered where the legitimacy of the law and/or the legitimacy of government are questioned. In a democratic context, that legitimacy is grounded upon procedural and/or substantive elements.<sup>81</sup> Perceived weaknesses in the political process by which tax law or other law is made, weakness in the law by which the tax revenue is appropriated by government, cynicism about the substantive outcomes of legislation<sup>82</sup> and also perceptions (founded or unfounded) of partial administration of the (tax) law<sup>83</sup> undermine trust in government. Such distrust thereby jeopardises the willingness of

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72 A point noted in: Anthony C Infanti, 'Deconstructing the Duty to the Tax System: Unfettering Zealous Advocacy on Behalf of Lesbian and Gay Taxpayers' in Anthony C Infanti and Bridget J Crawford (eds), *Critical Tax Theory: An Introduction* (Cambridge University Press, 1<sup>st</sup> ed, 2009) 100.

73 For example, the ATO is committed to upholding the model litigant rules while taxpayers, some with considerable resources and motivation to engage in lengthy tax disputes, are not similarly committed. For consideration of this issue see Camille Cameron and Michelle Taylor-Sands, "'Corporate Governments' as Model Litigants' (2007) 10 *Legal Ethics* 154.

74 Even Jean-Jacques Rousseau, who at one point seems to suggest that law can capture the will of all, was deeply sceptical of this possibility materialising in this world: Jean-Jacques Rousseau, *The Social Contract* (Maurice Crescent trans, Penguin, 1968) 83 [trans of *Du Contrat Social* (first published 1762)].

75 Infanti, above n 72, 100.

76 *Inland Revenue Commissioners v Duke of Westminster* [1936] AC 1, 19–20 (Lord Tomlin).

77 The most obvious example being the general anti-avoidance rules within *ITAA36* pt IVA, which add an important restriction upon the capacity of a taxpayer to minimise their tax liability.

78 *Federal Commissioner of Taxation v Spotless Services Ltd* (1996) 186 CLR 404, 414 (Brennan CJ, Dawson, Toohey, Gaudron, Gummow and Kirby JJ) ('*FCT v Spotless*').

79 Organisation for Economic Co-operation and Development ('OECD'), *Revenue Statistics 1965–2008*, (2009).

80 Dwyer, above n 54.

81 Tom R Tyler, *Why People Obey the Law* (Princeton University Press, 2006).

82 Infanti, above n 72.

83 See, eg, Robin Speed, 'The Rule of the Regulator' (2009) 49 *Weekly Tax Bulletin* 2164, [2309].

taxpayers and their advisers to contribute to the public revenue.<sup>84</sup> In this context, client centred advisers might justify their claim to be promoting the principles upon which a ‘good’ tax system would be grounded by acting as a ‘zealous advocate’ to ameliorate the effects of substantively unfair tax provisions with a view to enhancing the integrity of the tax system.<sup>85</sup>

The daily media diet consumed by many citizens can be expected to promote a cynical view of government – either on the basis of its incompetence, advancement of sectional interests and/or advancement of the various interests of those within government (politicians, bureaucrats).<sup>86</sup> Moreover, the secrecy surrounding some government processes within the taxation domain may contribute to this distrust of government, particularly where elements of the tax system exhibiting substantive unfairness are transparent. Assume for a moment that a person accords a high priority to tax fairness and that this is interpreted to include the exclusion of double taxation in a substantive sense as opposed to a juridical sense. In the circumstances of *Russell v Commissioner of Taxation* the fairness principle as interpreted would mean that either New Zealand or Australia, but not both, would collect tax from the income under consideration in that case, a point acknowledged albeit slightly by Logan J.<sup>87</sup> A tax administrator might be sympathetic to this fairness imperative, but other institutional imperatives such as the accountability of government to apply the (Australian) community’s law will also be significant, if not determinative. To a client centred moral activist the imposition of double taxation upon Russell would be unfair, but this perception of unfairness might be ameliorated were other factors of Russell’s case publicly available and/or if the Commissioner were seen to propose amendments to the taxation law that would overcome the double taxation.<sup>88</sup> Thus, public distrust in the integrity of the tax administration might arise, notwithstanding the best efforts of the Commissioner, to construct a ‘fair’ tax system.

Of course, cynicism regarding government might prompt individual action for reform of government to overcome such pathologies on the basis that government at least has the potential to promote the social good *or* such cynicism can promote or confirm the view that government is intrinsically beyond redemption. The latter view can sustain what McBarnet calls ‘creative

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84 Tyler, above n 81, 274; Amy Gangl, ‘Procedural Justice Theory and Evaluations of the Lawmaking Process’ (2003) 25 *Political Behavior* 119; Sol Picciotto, ‘Constructing Compliance: Game-Playing, Tax Law, and the Regulatory State’ (2007) 29 *Law and Policy* 11, 13–14.

85 Infanti, above n 72.

86 Margaret Levi, *Of Rule and Revenue* (University of California, 1988).

87 *Russell v Commissioner of Taxation* (2009) 74 ATR 466, 490–1 [113]. Justice Logan decided that the Australia/New Zealand double taxation agreement did not relieve Russell from ‘double taxation’ upon the basis that Russell’s private company, resident in New Zealand, was a separate legal entity for taxation purposes. From the Commissioner’s perspective, this lesson had been learnt, to the Australian community’s cost, in *Federal Commissioner of Taxation v Lamesa Holdings* (1997) 77 FCR 597.

88 At present, the Commissioner notes that such recommendations are not made public because they fall within the ‘government in confidence’ category: Michael D’Ascenzo, ‘Sights Set on the Horizon’ in Michael Walpole and Chris Evans (eds), *Tax Administration: Safe Harbours and New Horizons* (Fiscal Publications, 2008) 19, 23.



compliance' with the law.<sup>89</sup> Moreover, other factors such as the commodification of advisory services might lead advisers to believe that the market will determine the extent to which altruistic or 'public interest' behaviour ought to be undertaken.

(c) *Legal Determinacy*

Another ideological element that underpins, without dictating, the client centred approach is the legal determinacy thesis. The determinacy thesis is a core element of what has been described as 'Antipodean positivism'.<sup>90</sup> Antipodean positivists construct the concept of law in a manner that is functionally appealing and consistent with the democratic aspirations of many communities including Australia. Antipodean positivism holds that any statutory rule constitutes a rule of determinate meaning that records the political resolution of a contest between incommensurable moral principles. According to this view, the role of an adviser is to discover, marshal and apply relevant legal authorities in determining the law in a particular case. Just as a judge discovers determinate law, so the role of the adviser is merely to reveal what already exists, rather than playing an active role in creating law. This determinacy thesis is adopted by some legal positivists who accept a 'thin' rule of recognition<sup>91</sup> and also by contemporary natural lawyers who argue that the law imports moral principles that dictate a determinate outcome.<sup>92</sup>

Although this depiction of legal practice has been subjected to considerable criticism,<sup>93</sup> it remains a prominent discourse in the professional realm and also when academics come to teach law students.<sup>94</sup> Indeed, in the realm of taxation law, it has been suggested that there is more of a case for 'clear law'. Thus, for example, in *Federal Commissioner of Taxation v Sydney Refractive Surgery Centre Pty Ltd* the Full Federal Court observed:

Taxation is an area of the law that particularly calls for the imposition of bright-line rules rather than fuzzy standards. We agree that adoption of the position contended for by the Commissioner would lead to all sorts of mischief. First, the adoption of a case-by-case approach would impair the ability of the court awarding damages to apply the *Gourley* principle. At best, it would mean that proceedings would be prolonged, with leave having to be granted to plaintiffs to reopen depending on the position subsequently taken by the Commissioner and the courts on the tax issue. This would deny finality to the party liable for the damages, because the full extent of the liability might not be known for years. Secondly, acceptance of the Commissioner's contention would encourage plaintiffs to withhold evidence and reframe damages claims in ways that might

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89 McBarnet, above n 26.

90 Dyzenhaus, above n 20.

91 Jeffrey Goldsworthy, 'Judicial Review, Legislative Override, and Democracy' (2003) 38 *Wake Forest Law Review* 451.

92 Reference to the internal morality of the law may be discerned in: Michael Kirby, 'Judging: Reflections on the Moment of Decision' (1999) 18 *Australian Bar Review* 4, 8. See also M H McHugh, 'The Judicial Method' (1999) 73 *Australian Law Journal* 37, 48–9.

93 See, eg, Roberto Mangabeira Unger, *The Critical Legal Studies Movement* (Harvard University, 1986).

94 For a contemporary discussion of this legal 'faith' see: Smith, above n 37.

reduce the accuracy of the awards. Rather than leading evidence and making claims calculated by reference to lost profits, plaintiffs would have an interest in asking the courts to make at large awards based on estimates and undifferentiated lump sum awards encompassing both economic and non-economic loss so that they could avoid taxes: (2008) 247 ALR 313 at [43], [56]. Encouraging the calculation or specification of damages with less accuracy is not in the interests of the parties or of justice generally. Finally, the adoption of a fuzzy standard would increase the work of the Commissioner and the courts – many cases would lead to a private ruling request as to assessability or an objection decision, as well as possible requests for judicial review. Rather than furthering the protection of the revenue, the Commissioner's proposed approach would probably only benefit lawyers and accountants.

We consider that the better approach for the Commissioner, if he is of the view that damages awards for defamation ought to be assessable, is to seek a statutory amendment to that effect.<sup>95</sup>

Unlike open-ended moral argument, legal argument focuses upon the resolution of practical problems by finding the authoritative legal rule, the right answer comprising the best interpretation of those legal authorities. Advisers who provide this service should be free of moral censure, irrespective of the consequences of their legal advice.<sup>96</sup>

If this determinacy thesis is accepted, law offers a refuge from the chaos of politics. This determinacy discourse is the dominant discourse in the Australian taxation realm. The Commissioner of Taxation routinely proclaims that Australia is a rule of law country,<sup>97</sup> the judiciary professes the need for clear rules,<sup>98</sup> politicians and commentators pillory 'activist' judges<sup>99</sup> and tax commentators and participants often draw a distinction between 'the black letter of the tax law' and arbitrary taxation.<sup>100</sup> If the tax law is as certain as the determinacy thesis suggests, a practitioner contemplating ethical issues is faced with a stark choice – uphold 'the law' or else step outside the law by breaking the law on ethical grounds – there is no room for ethical considerations within the practice of tax law once one has decided to comply with the law.

#### (d) *The Professions and Professionalism*

The grant of monopoly rights to practise a socially useful skill is inconsistent with the dominant ethos of a free market,<sup>101</sup> and so the mystery confronting sociologists is how and why it is that many 'modern' societies have granted such monopoly rights to professions such as lawyers and accountants.<sup>102</sup> On a

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95 *Federal Commissioner of Taxation v Sydney Refractive Surgery Centre Pty Ltd* (2008) 172 FCR 557, 570 ('*Sydney Refractive Surgery*').

96 Sir Anthony Mason, 'Where Now?' (1975) 49 *Australian Law Journal* 570, 574.

97 D'Ascenzo, 'The Rule of Law: A Corporate Value', above n 12; George Megalogenis, 'ATO Fears Blame for Pain of Reform', *The Australian* (Sydney), 9 July 1997, 2.

98 As in *Sydney Refractive Surgery* (2008) 172 FCR 557.

99 See, eg, Bill Muehlenberg, 'The Threat of Judicial Activism', on *Quadrant* (2 November 2008) <<http://www.quadrant.org.au/blogs/muehlenberg/2008/11/the-threat-of-judicial-activism>>.

100 Speed, above n 83.

101 Eliot Freidson, *Professionalism: The Third Logic* (University of Chicago Press, 2001) 1.

102 *Ibid*; Keith M MacDonald, *The Sociology of the Professions* (Sage, 1995) ch 1.

Weberian view, characterised by competition for ‘power,’<sup>103</sup> the historical emergence of the professions is the product of instrumental action by those professionals,<sup>104</sup> rather than a perhaps silent societal allocation of essential functions to particular sub-groups in the name of efficiency.<sup>105</sup> If the Weberian view is adopted, one sees that the emergence of the ‘tax profession’ as a professional group is built upon the projection of advisers as impartial intermediaries exercising unique skills. Similarly, a significant aspect of a functionalist model of the professions is acknowledgment of the skilful, socially useful work undertaken by the professional.

The skilful discovery of the right interpretation of determinate tax law that underpins this projection of professional work – a projection that is consistent with the positivist paradigm – can be contrasted with the open-ended ethical cogitations that a professional adviser might be expected to raise with their clients were such advisers minded to embark upon ‘ethical’ practice. Although there is a public service element to the discursive practice of the professions, the training of tax professionals emphasises technical skill rather than ethical deliberation upon ‘the common good’,<sup>106</sup> and so adoption of ethical practice could be expected to diminish the standing of tax professionals as technical specialists within the broader community. Having invested considerable resources in acquiring technical skills, it is reasonable to expect that many practitioners will be loath to embark upon a reorientation of their professional projection towards ethical advisers, a field in which they cannot readily differentiate themselves from others within the community.

However, tax ethics has become more prominent in the professional discourse in recent times as a result of several scandals and a paradigm shift towards reregulation.<sup>107</sup> These crises might have precipitated a challenge to the positivist construction of law. However, a positivist model has been pursued by focusing upon ‘tightening’ the regulatory framework and by perpetuating the law/ethics dichotomy with calls ‘from the outside’ for higher moral standards.

A ‘hard’ Weberian analysis of professional participation in the discourse of tax ethics would suggest that the professional bodies will seek to control the damage to their standing in the community by reacting to government and societal pressure rather than engaging in proactive promotion of the ethical debate for its own sake.<sup>108</sup> Empirical study of the nature and extent of

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103 Weber, above n 46, vol 1, pt 2, ch 2; Magali Sarfatti Larson, *The Rise of Professionalism: A Sociological Analysis* (University of California, 1977). Just what power means here is a moot point – it may include market power, social prestige and also the capacity to influence social policy.

104 Ibid.

105 This earlier functionalist sociology of the professions is evident in, eg, Emile Durkheim, *Professional Ethics and Civic Morals* (Free Press, 1957).

106 Jane B Baron and Richard K Greenstein, ‘Constructing the Field of Professional Responsibility’ (2001) 15 *Notre Dame Journal of Law, Ethics & Public Policy* 37; Smith, above n 37.

107 Doyle et al, above n 30; Coleman and Mescher, above n 38.

108 Of course, this ‘hard’ Weberian analysis emphasises instrumental action in protecting/furthering the standing of the professional groups and thereby diminishes other factors that no doubt exist, such as altruistic endeavour.

professional promotion of tax ethics in Australia is wanting, but in the United Kingdom and Ireland it has been noted that professional engagement with tax ethics may amount to little more than damage control on the part of professional groups in response to tax scheme scandals.<sup>109</sup>

(e) *The Commodification of Tax Advice*

When speaking of professional work it is easy to slip into the assumption that the nature of this work is immutable. However, a significant development in professional work is the emergence of a market ethos and the diminution of the ethos of public service.<sup>110</sup>

According to the market ethos, society most efficiently allocates limited resources when that allocation is undertaken for a price determined by a free market.<sup>111</sup> Thus, public services provided by professionals may be noble, but they are not necessarily efficient and may do more harm than good.<sup>112</sup> This ethos of the market echoes the strands of liberal individualism outlined above – the role of the tax adviser is to sell tax advice services to clients who desire their respective vision of the good life. If clients want ethical advice, they will ask for it, but it is not the role of a professional tax adviser unilaterally to go beyond the scope of their instructions. Advisers who do so can expect to lose ‘market share’ to other, more constrained professional advisers. Moreover, advisers who fail to advise their clients regarding tax minimisation strategies may be sued by disgruntled clients.<sup>113</sup>

(f) *Bureaucratisation*

Arguably any legal system embodies a tension between formal and substantive justice – a competition between the imperative of certain application of prospective rules and flexible determination of the appropriate law where justice or other imperatives indicate that formal rule application is inappropriate.<sup>114</sup>

Under the liberal theory of law the formal application of determinate, prospective rules affords security to individuals in making their allocative decisions in free markets and enables the accountability of government to its subjects. As a mere functionary of the state, a tax administrator is institutionally constrained to determine and apply ‘the law’. Evidence of this liberal conception of the administration of determinate law can be seen in the recurrent criticisms of

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109 Doyle et al, above n 30.

110 Freidson, above n 101, 187 ff.

111 Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (Oxford University, first published 1776, 1976 ed) 292.

112 Ibid.

113 For discussion of this see: V A Morfuni, ‘The Civil Liability of Tax Advisors’ (2005) 34 *Australian Tax Review* 131.

114 Duncan Kennedy, ‘Legal Formality’ (1973) 2 *Journal of Legal Studies* 351.

what is portrayed as the Commissioner's discretionary administration of the taxation law.<sup>115</sup>

There is currently a debate in Australia as to whether the Commissioner of Taxation should be allowed a broader discretionary power with respect to the enforcement of tax laws which have unforeseen and unfair consequences.<sup>116</sup> This debate has arisen as a result of the conservative approach adopted by the current and past Commissioners to their care and management power over the tax system.<sup>117</sup> Whilst it is acknowledged that the ATO adopts a practical compliance approach<sup>118</sup> this limited incursion of ethical considerations into the legal domain is far different from admitting a wide ranging consideration of ethics into the application of law. Where the taxation law generates unforeseen or 'unfair' consequences the Commissioner routinely professes a formalist model by stating that the law is not the responsibility of the ATO but rather that of Parliament.<sup>119</sup> Such a formalist model is consistent with legal positivism and denies the relevance of ethics to the application of the law.

On the other hand, at times the Commissioner seems to suggest that practitioners ought adopt a substantive approach to applying the law – suggesting that they have a discretion not to take advantage of loopholes and that they should exercise this discretion in such a way as to protect the community's tax system.<sup>120</sup> However, such suggestions are faintly made as the Commissioner is no doubt well aware of the dangers associated with inviting a broad ethical consideration of the tax system as a routine aspect of tax administration. The bureaucratisation of law under a formalist legal model underpins the Commissioner's restriction of the administrator's role to one of upholding 'the law', and thereby contradicts any suggestion that tax advisers ought step outside the formal law and 'act ethically' in the course of their tax compliance work.<sup>121</sup>

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115 See, eg, K W Ryan, 'Curbing the Commissioner's Discretionary Powers' in R E O'Neill et al (eds), *Tax Essays* (Butterworths, 1979). More recently see Speed, above n 83.

116 Tim Neilson, 'A Current Controversy and the "Rule of Law"', (2009) 44 *Taxation in Australia* 224.

117 Here 'conservative' is not intended in any pejorative sense, but merely takes account of the institutional constraints faced by any Australian Commissioner of Taxation, as noted in the preceding sentences.

118 Under this approach the ATO interprets the law in a sensible way to avoid unnecessary compliance costs: acknowledged by the Commissioner in Michael D'Ascenzo, 'Top End Tax Risk Management – the Journey Continues' (Speech delivered at the PricewaterhouseCoopers Boardroom Dinner, Brisbane, 28 June 2006). However any discretionary power that the Commissioner has to apply the law is limited: see, eg, Ray Conwell, 'The Commissioner's Discretion's and Indiscretions – Changing Attitudes to the Use of the Commissioner's Powers' (Paper presented at the Taxation Institute of Australia 9<sup>th</sup> National Convention, Adelaide 1990) and D'Ascenzo, 'The Rule of Law: A Corporate Value', above n 12.

119 See especially D'Ascenzo, 'The Rule of Law: A Corporate Value', above n 12.

120 See, for example, Michael D'Ascenzo, 'Consultation, Collaboration and Co-Design with the Accounting Profession' (Speech delivered to the National Institute of Accountants, Canberra, 28 November 2007). In fact, many in the ATO, view with disdain the activities of tax advisers in promoting their clients interests even though a facet of their ethical duties is clearly to do so: Michael Walpole, 'Ethics and Integrity in Tax Administration' (Research Paper No 2009-33, University of New South Wales ATAX, 2009).

121 Many tax practitioners give considerable time to consultation upon proposed changes to the taxation system. It can be expected that this unpaid work will be undertaken for mixed purposes – professional development in remaining abreast of current developments and also a genuine desire to contribute to the betterment of their community.

## B The Responsible Adviser Approach

### 1 *Responsible Advising – Upholding the Spirit of the Law*

The stark portrayal of the opposition of individual and state exhibited in the client centred model is rejected by many practitioners who nevertheless accept that law has determinate meaning and that law is distinct from ethics.

Many judges and practitioners acknowledge that the meaning of a particular provision can be difficult to ascertain for all sorts of reasons.<sup>122</sup> Whilst acknowledging this difficulty, a variant of the determinacy thesis holds that an adviser is obliged to uphold the spirit, intention or purpose of the law, even if ascertaining that purpose is problematic.<sup>123</sup> In particular, this model of legal practice suggests that a practitioner should not adopt interpretations of legal rules that may be supported by ‘the letter of the law’ but which are not consistent with the apparent purpose or spirit of the law.

The responsible adviser approach therefore shares with the client centred approach a deep ethical commitment to upholding the community’s law, but differs as to how that law is identified (by looking to the purpose, intention or spirit of the law). Responsible advising adopts an accommodating approach to dysfunctional state institutions by ‘papering over the cracks’ of legislative ambiguity and legislative lacunae, rather than exposing and exploiting such legislative flaws as a client centred adviser would do. Notwithstanding such legislative defects, the responsible adviser is confident in their technical ability to identify the purpose of the law and hence find the right legal answer.<sup>124</sup>

### 2 *The Ethical Basis of the Responsible Adviser Viewpoint*

Like the client centred adviser, the responsible adviser is a particular type of moral activist. Despite the responsible adviser’s purported adherence to the tenets of legal positivism in pursuing the ‘spirit’ of the law without consideration of ethical matters, the responsible adviser actively pursues a particular ethical outlook, being the implementation of Parliament’s purpose.

The responsible adviser’s interpretive approach is motivated by a different ethical stance with respect to legislation, and in particular with respect to the interrelationship of individuals, community and state institutions. Rather than envisaging social relations in an adversarial light, responsible advising approaches legislation as the product of a ‘partnership’ between the citizenry and the state.<sup>125</sup> This partnership model echoes Rousseau’s proposition that the legitimacy of legislation springs from the ‘general will’, being the will that is

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122 Kirby above n 92. See also McHugh, above 92, 48–9.

123 Gordon, above n 32, 222–4.

124 Goldsworthy suggests that the appropriate interpretive community, to whom legislative statements ought be taken to have been directed, is lawyers: Goldsworthy, ‘Legal Intentions, Legislative Supremacy and Legal Positivism’, above n 9, 502 n 21. In the context of the taxation system, arguably this exclusion of accountants and other tax specialists is inapposite.

125 This partnership model is reflected in some democratic models, particularly participatory and deliberative models. For a normative expression of such models see: OECD, *Citizens as Partners* (2001).

common across all members of the community.<sup>126</sup> Responsible advisers therefore seek to fulfil that general will by pursuing the purpose of legislation.

A thin positivist inclined to adopting the responsible adviser model can be expected to reject this ‘moral activist’ tag by noting that statutory rules,<sup>127</sup> rather than an ethical stance, require this pursuit of the legislative purpose. If this were true, the responsible adviser could not be a moral activist but rather would merely be a legal rule applier. We contend that this positivist argument fails because the existence of one true legislative purpose is illusory<sup>128</sup> and so the construction of a perceived legislative purpose from particular ‘authorised’ materials imports a moral element into the law. Thus, the debate between positivist literalists and positivist intentionalists is grounded upon consequentialist arguments which invoke the respective proponents’ vision of a morally defensible legal order. Positivist literalists argue that focusing upon the statutory text is the only way to secure democratic principles,<sup>129</sup> while positivist intentionalists maintain that intentionalism protects democracy because it secures legislative deference, it is faithful to the determinacy orthodoxy and it excludes the capricious outcomes that literalism can create.<sup>130</sup> In the latter camp, Goldsworthy accepts that a ‘real’ legislative purpose is illusory and instead proposes that we pursue an artificially constructed purpose, being the intended meaning gleaned from evidence that is readily available to the ‘intended audience’ (being those with specialised legal knowledge).<sup>131</sup> The debate between positivist literalists and positivist intentionalists is framed upon ethical, not legal, grounds. The responsible adviser’s intentionalist interpretive model therefore reflects a preference for a particular political model that grounds the legitimacy of law in a particular view of the democratic political process by which that law is made.

Rather than a responsible adviser merely being a *legal* rule applier, the responsible adviser pursues a particular ethical construction of the legitimacy of legislation and of its proper ethical interpretation.

### **3 *The Significance of Legal Positivism within the Sociological Factors That Shape and Sustain the Responsible Adviser Approach***

#### **(a) *Legal Determinacy***

The responsible professional approach shares many of the same justificatory discursive themes which support adherence to the client centred approach. The centrality of legal positivism within the responsible adviser model can be seen most particularly in adoption of the rule of law discourse that sees the adviser as

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126 Rousseau, above n 74, 69.

127 At the Commonwealth level, see: *Acts Interpretation Act 1901* (Cth) ss 15AA–15AD.

128 For discussion of this see, eg: Michael S Moore, ‘A Natural Law Theory of Interpretation’ (1985) 58 *Southern California Law Review* 277, 350–2.

129 Jeremy Waldron, ‘Can There Be a Democratic Jurisprudence?’ (2009) 58 *Emory Law Journal* 675, 691.

130 Jeffrey Goldsworthy, ‘Legislation, Interpretation, and Judicial Review’ (2001) 51 *University of Toronto Law Journal* 75, 84–5.

131 Goldsworthy, ‘Legal Intentions, Legislative Supremacy and Legal Positivism’, above n 9, 502.

an oracle for ‘the law’.<sup>132</sup> This construction of professional practice imports the discursive factors of professional skill and the independence of the tax profession – only professional advisers are equipped with the requisite skill (notwithstanding the fact that that advice can be subject to considerable uncertainty).<sup>133</sup> Like the client centred adviser, adherence to the positivist separation of law from morality means that the personal ethical commitments of the responsible tax professional are irrelevant to the content of tax advice framed upon the purpose or spirit of the tax law.

*(b) Public Service and Professionalism*

A hallmark of professionalism is a commitment to public service – modern states allow particular professional groups to monopolise the provision of their respective services on the understanding that the provision of such services is undertaken in the public interest. The responsible adviser model of professional practice adopts a particular construction of this ‘public service’ aspect of professional work.

Legal positivism is often portrayed as a central constitutional plank in the protection of individual rights against the state<sup>134</sup> – clearly evident in the client centred approach.<sup>135</sup> In the context of the responsible adviser model this liberal deployment of legal positivism seeks a balance between limiting state incursions upon the liberty of autonomous individuals<sup>136</sup> and a more favourable, but nevertheless liberal, treatment of state power which acknowledges the importance of a state architecture in creating the context for individuals to fulfil their respective visions of the good life. The responsible adviser approach casts the professional adviser more in terms of a servant of the public’s legislatively expressed will, and in doing so adopts a particular characterisation of the ‘public service’ aspect of professionalism. A client centred adviser might argue that it is in the public interest for an adviser to limit what are characterised as state incursions into the domain of autonomous individuals. By contrast, the responsible adviser maintains that it is in the public interest to fulfil the legislatively expressed will of the political majority. As a member of such an ideal community, Rousseau suggested, any individual will promote compliance with the community’s law as that law embodies the general will. Smith’s construction of tax as a ‘badge of liberty’<sup>137</sup> conveys a similar sense that taxation is a cause for celebrating the capacity of humans to unite in community.

However, the discourse of the responsible adviser acknowledges the need to balance distrust of state organs with the communitarian discourse. This communitarian ethos is also closely constrained by adherence to the will of the

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132 Thus Goldworthy likens the role of a lawyer to that of a translator: *ibid* 502 n 21.

133 Gordon, above n 32.

134 James Allan, ‘An Unashamed Majoritarian’ (2004) 27 *Dalhousie Law Journal* 537.

135 See Pt III (A)(3) ‘The Ethical Basis of the Client Centred View’.

136 Isaiah Berlin’s concept of ‘negative liberty’ from the essay, ‘Two Concepts of Liberty’: Isaiah Berlin, *Four Essays on Liberty* (Oxford University Press, 1969).

137 Smith, above n 111, 857.



majority embodied in the purpose or spirit of the law – consistent with thin positivism.

## C Moral Activism

### 1 Law as Subsidiary to Morality

Thus far we have seen that tax advisers who profess the client centred or responsible adviser approaches are what might be called conservative moral activists – they purport to remain within the law by professing ‘thin positivism’ but in truth adopt particular ethical frameworks that are not necessarily dictated by any ‘rule of recognition’.

A third strand of moral activism is prepared to express openly the view that law is subsidiary to morality.<sup>138</sup> Under this strand of moral activism, an immoral norm cannot be a valid legal norm.<sup>139</sup> Some commentators suggest that the practitioner’s role as an enforcer reflects their duty to act in society’s best interests,<sup>140</sup> others suggest that in seeking to earn profits and minimise costs professionals must be held accountable to some level of collective wellbeing,<sup>141</sup> while others suggest that the exercise of professional judgment requires that advice be couched in the context of justice and good faith and advisers, at least, are responsible to the community<sup>142</sup> and for achieving a just termination of disputes.<sup>143</sup>

Although this third strand of moral activism can be found in the academic literature, in general it is fair to say that it is not in the mainstream understanding of professional practice. At best, it is fair to say that there are only half-hearted equivocal suggestions of this strand of moral activism.

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138 Luban, above n 25.

139 Of course of this debate permeates the whole of legal practice not just tax advice: see the references referred to in Parker, above n 56, 677 n 3, 679 n 14.

140 See Attwell and Sawyer above n 59, 113, also citing Philip M J Reckers, Debra L Sanders and Robert W Wyndelts, ‘An Empirical Investigation of Factors Influencing Tax Practitioner Compliance’ (1991) 13(2) *Journal of the American Taxation Association* 30, 32. See also Leslie S Shapiro, ‘Doing What Is Right’ (1996) 41(12) *National Public Accountant* 7.

141 Don R Hansen, Rick L Crosser and Doug Laufer, ‘Moral Ethics v Tax Ethics: The Case of Transfer Pricing among Multinational Corporations’ (1992) 11 *Journal of Business Ethics* 679, disagreeing with Urmsion quoted as suggesting that the duty of the tax practitioner is to assist the client in complying with the law and going beyond this requirement should be left to saints: Urmsion, above n 56. For another appeal to tax practitioners to demonstrate a concern for moral considerations beyond that required by law or economic efficiency see Alan Stainer, Lorice Stainer and Alexandra Segal, ‘The Ethics of Tax Planning’ (1997) 6 *Business Ethics: A European Review* 213.

142 Tony Greenwood, ‘Ethics and Avoidance Advice’ (Paper presented at The New Corporate Morality, Australian Institute of Directors Seminar, Melbourne, 21 March 1991). Greenwood suggests that some motivation, at least, for a more thoughtful analysis of the larger issues with which legislation deals comes from the now favoured purposive approach to interpretation: at 9.

143 Alvin B Rubin, ‘A Causerie on Lawyers’ Ethics in Negotiation’ (1975) 35 *Louisiana Law Review* 577. Thus it is argued that an adviser should not accept a result that is unconscionably unfair to the other party because, perhaps, the other party had acted on mistaken facts. This duty to the profession and society must supersede any duty to the client. On this basis full disclosures should be made to the tax authority (even of material it may not have requested) and it should be advised of deficiencies in the taxpayer’s case.

For example, section 100 of the Institute of Chartered Accountants' *Code of Ethics* states:

100.1 A distinguishing mark of the accountancy profession is its acceptance of the responsibility to act in the public interest.

Therefore, a Member's responsibility is not exclusively to satisfy the needs of an individual Client or employer. In acting in the public interest a Member should observe and comply with the ethical requirements of this Code.

The public interest is defined as the collective well-being of the community of people and institutions that the Members serve. The accountancy profession's public consists of clients, credit providers, governments, employers, employees, investors, the business and financial community, and others who rely on the objectivity and integrity of members to assist in maintaining the orderly functioning of commerce.

This ethical standard is open to interpretation – it could be in the public interest of the community that 'the law' is upheld irrespective of the consequences just as the public interest might be taken to require a consideration of the consequences measured against some 'external' moral standard.

Similarly, the leading Australian tax law text adopts an equivocal consideration of the role of ethical norms to professional work:

Taxation advisers owe obligations to society at large to act *honourably and appropriately* in relation to tax matters, although any conflict which arises between such obligations and the obligation owed to the client must *generally* be resolved in favour of the client.<sup>144</sup>

This statement exhibits considerable ambiguity but seems to confer ultimate priority to the client centred construction of professional practice, notwithstanding reference to ethical standards.

All of these statements seem to accept the positivist proposition that ethics are beyond law and, in doing so, offer tax advisers the stark choice between acting within the law (and perhaps contrary to the advisers' construction of ethical norms) and acting outside the law.

## 2 *Social Pressure for Adoption of a Pro-Tax Ethic*

Calls for an express integration of ethics within tax practice have been prompted by claims that a thin positivist model of professional practice does not describe 'real' professional practice (an empirical claim) and/or that it ought not describe professional practice (a normative claim).

To many, the amoral wasteland which epitomised the commercial world of the 1980s gave way to a new ethos where, for example, we see corporations condemned for attempting to avoid tortious liabilities to employees,<sup>145</sup> tax havens

144 Rob Woellner et al, *Australian Taxation Law* (CCH Australia, 2009) 1988 [33-940] (emphasis added).

145 See, eg, the James Hardie affair where the James Hardie Group sought to avoid liability to victims of asbestosis arising from its operations and products by restructuring offshore and leaving an inadequate compensation fund. For a summary of some of the issues arising from this saga see: Peter Prince, Jerome Davidson and Susan Dudley, 'In the Shadow of the Corporate Veil: James Hardie and Asbestos Compensation' (Research Note No 12, Parliamentary Library, Parliament of Australia, 2004–05). Proceedings were subsequently successfully brought against senior staff within the organisation by ASIC: *ASIC v McDonald (No 11)* (2009) 230 FLR 1.

persecuted,<sup>146</sup> greedy banks vilified, a burgeoning literature upon corporate social responsibility<sup>147</sup> and obligations on corporate officials continually being strengthened.<sup>148</sup>

In this world, it is suggested, there is no place for the amoral legal adviser<sup>149</sup> especially when the ATO constantly projects its own ethical credentials (although those credentials are circumscribed, being limited to the Australian Public Service Code of Conduct).<sup>150</sup> To remain relevant the new age tax adviser should engage their client in a consideration of broader social issues.

### **3 Issues That a Moral Activist Practitioner Would Need to Address**

For the reasons set out earlier in this paper, a practitioner contemplating adoption of a moral activist stance must weigh a number of complex matters, including those briefly described below. This is not intended to be a comprehensive discussion of these considerations, but rather illustrates the point that stepping beyond the positivist legal paradigm would require a practitioner to weigh myriad moral issues upon which there is no clear outcome. We argue that faced with such open-ended ethical questions, a mainstream tax adviser prefers to adopt the projection of certain law that thin positivism portrays.

#### *(a) Supporting Immoral Governments*

Tax revenues provide the means by which government policies can be carried out. As was observed above in identifying a shortcoming of the responsible adviser approach, the assumption that these policies are developed and framed for the benefit of the general community is questionable. This also has implications for the moral activist.

If the law is unfavourable to a client, is the moral activist tax practitioner entitled to question the legitimacy of the law in their advice and encourage non-compliance? On the other hand, if the client is part of the sectional interests favoured by a particular law<sup>151</sup> should the tax adviser nevertheless question the legitimacy of the law and, hence, reliance upon it by the client?

More generally, where a government uses funds to further policies which in the view of a tax adviser are immoral is tax advice that furthers a program of civil disobedience justified or even mandated? For example, were Joan Baez and her fellow anti-Vietnam war protesters in the United States morally justified in

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146 See especially the OECD, *Harmful Tax Practices*

<[http://www.oecd.org/topic/0,3373,en\\_2649\\_33745\\_1\\_1\\_1\\_1\\_37427,00.html](http://www.oecd.org/topic/0,3373,en_2649_33745_1_1_1_1_37427,00.html)>.

147 See the anthology in Doreen McBarnet et al, *The New Corporate Responsibility* (Cambridge University Press, 2007).

148 Corporations laws, taxation laws, competition laws and occupational health and safety laws have all been strengthened in the last two decades to place a greater liabilities on corporate officials.

149 Rubin, above n 143, 585.

150 The ATO advertises both its integrity rules to ensure appropriate behaviour by its staff and the institution's taxpayers' charter and other commitments to the community.

151 Or ATO ruling.

suggesting that taxpayers withhold 60 per cent of their tax revenue funding the Vietnam war?<sup>152</sup>

(b) *Whose Morals?*

Once we talk of an ethical or moral approach to tax advising we are immediately confronted with the issue as to what moral paradigm should be relied upon in support of moral positions advanced. Some commentators have suggested that the moral position to be adopted is essentially based on intuition, namely being forged from the experience of the adviser following a true heart.<sup>153</sup>

(c) *Moral Incommensurability*

Assuming for the moment that it is possible to identify a set of moral principles to which we as a community subscribe, it is possible that the set of moral principles will not necessarily speak with integrity on any particular issue. That is, different moral principles within the 'moral code' might point in different directions. For example, Endicott notes that a tax may be unjust because it undermines moral principles of justice and/or because the use of the tax revenue might be immoral. However, Endicott also notes that there is moral value in having a tax law that allocates the 'burden' of government as opposed to having no such law at all and an arbitrary allocation of that burden.<sup>154</sup> The application of the one ethical imperative can be extremely problematic, making the provision of 'ethical' tax advice extremely problematic.

(d) *Practical Considerations*

The skills needed by a practitioner to enunciate a moral position to a client which is at odds with the client's self-interest cannot be understated. Clients may not appreciate being 'preached' to or the suggestion that they might be considering engaging in unethical conduct. It takes particular strength of character on behalf of the practitioner combined with a careful choice of words and an education of clients that professional advice encompasses many facets not merely an analysis of technical legal rules. Of course the more significant the client to the bottom line of the adviser the more delicate the provision of ethical advice may become.

Practitioners and, indeed, their clients must also be cognisant of the fact that in any ethical debate over the morals of a particular course of action a distinction should be drawn between motivations and justifications. This distinction is identified in the literature that examines the motivations for tax avoidance. Typically tax avoiders will seek to justify their behaviour on fairness grounds

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152 In the Vietnam War, tax protestors, and the history of war, tax resistance, generally see: Peace Tax Seven, 'History of War Tax Resistance' <<http://www.peacetaxseven.com/history.html>>.

153 See Ross and Burgess above n 5, chs 9–10; Stan Ross, 'Tax Ethics Education in the US and Australia' (1992) 9 *Australian Tax Forum* 27.

154 Timothy Endicott, 'Symposium on Natural Law and Natural Rights: The Subsidiarity of Law and the Obligation to Obey' (2005) 50 *American Journal of Jurisprudence* 233, 242–3.

such as ‘other people are avoiding tax’, ‘the government is spending money unwisely’ or ‘my business will suffer and I will be forced to lay off employees’. Often these justifications are an after-the-fact rationalisation by taxpayers in an effort to vindicate their earlier behaviour rather than the cause or motivation for their behaviour.<sup>155</sup>

#### IV CONCLUSION

Our taxation law embodies myriad ethical decisions on who (entities), what (tax base), when (timing), where (jurisdiction), how (tax administration) and how much (tax rate) – questions that any tax system must answer. However, express consideration of the ethical foundations of the Australian taxation system has been marginalised because of the predominance of a positivist conception of taxation law. Acceptance of that positivist account of law means that the subject of ‘tax ethics’ has come to be defined in legal terms. The starting point for any ‘mainstream’ consideration of ‘tax ethics’ in Australia has become a commitment to the rule of law.

As a result of this commitment to the rule of law, and in particular to a positivist concept of the rule of law, in Australia the subject of ‘tax ethics’ focuses upon choosing the correct method of legal interpretation. No matter which one is selected from the client centred, responsible adviser or moral activist approaches, the tax adviser is unquestionably constrained by an ethical and legal commitment to uphold ‘the law’. The client centred adviser seeks to ensure that Leviathan extracts not a cent more than is due from the oppressed tax subject by pressing pro-taxpayer constructions of ‘the law’. The responsible adviser finds ‘the law’ in some construction of the legislative ‘spirit’, the legislative intention or the legislative purpose. On one construction, the ‘moral activist’ adviser is little different from the client centred adviser except for the fact that he or she pursues the technical reading of the legal rule that promotes a favoured moral imperative other than protecting the individual from the state (and which may or may not be in favour of the revenue).

A broader consideration of the ethics embodied within the Australian taxation system – for example the fairness of the tax system and the ethical merits of the tax legislative process – are not commonly associated with the subject of tax ethics. Notwithstanding this marginalisation of wider ethical issues through the ‘legalisation’ of the subject of tax ethics, the different ethical models simultaneously outwardly project a limited ethical compass whilst internalising commitments to particular ethical visions. The choice of interpretative approach entails consideration of what counts as ‘law’ within a community and of the allocation of law making power within that community. Irrespective of the

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155 The literature on this topic is discussed in Maryann Richardson and A J Sawyer, ‘A Taxonomy of the Tax Compliance Literature: Further Findings, Problems and Prospects’ (2001) 16 *Australian Tax Forum* 137, 182.

current social practice in regard to these matters, they are deeply ethical. For example, the client centred approach accepts that parliament is the sovereign law maker within the Australian community and holds parliament to that task by paying no more tax than parliament has ‘clearly’ demanded. Under this view, the passive subject of the tax feels no obligation to adopt a quasi-legislative role by adopting a pro-revenue construction in order to perfect imperfect legislation. To do so would undermine the terms of the social contract by which sovereign individuals conferred exclusive law making power upon the state.

Of course, the relatively static content of ‘tax ethics’ in Australia does not mean that this narrow construction of the subject must continue. It represents a contingent construction of our social world but it is a construction in which many within the community have invested capital. Those investments create considerable social inertia that resists adoption of a broader ethical subject. Ideologically, the monist construction of the optimal means for constructing social order means that the rule of law with centralised law making power constitutes a powerful discourse. That discourse sustains resistance to any acceptance of a pluralist social order in which law making power is diffused. Institutionally, those involved in the administration of the law have good reason to maintain a narrow ethical compass. The institutional constraints of public accountability and taxation secrecy mean that the Commissioner of Taxation understandably endorses a bureaucratised vision of tax law in which ethical activism plays no part (at least for tax administrators). Heavy investments in obtaining professional qualifications grounded upon the possession of unique technical skills, as well as the reality of earning a living in a competitive marketplace, mean that tax professionals are hardly likely to challenge the orthodox marginalisation of ethical considerations.

On occasion an alternate vision of the subject of ‘tax ethics’ is suggested, albeit faintly. Commissioners of Taxation, academics and even the High Court’s somewhat Delphic reference to Justice Holmes’s aphorism in *FCT v Spotless*<sup>156</sup> have hinted at a broader construction of the ethical field in which ethics is not necessarily subservient to law. However, in the absence of an articulated challenge to the ‘legalisation’ of the ethical field and in the absence of a pluralist ethical model, it is most unlikely that an alternate construction of the ethical field will emerge as a serious contender. Rather, those affronted at the behaviour of some members of the community will adopt the positivist paradigm and pursue social change through legislative reform.

It seems unlikely that the narrow Australian construction of ‘tax ethics’ will change while so many routinely involved in the operation of the tax system intransigently adopt a positivist legal model. That model is contingent, but will only be displaced if subjected to pressure on several fronts. Theoretically, the arbitrary features of the thin positivist model such as the narrow definition of ‘legislative intention’ and the restriction of ‘correct interpretation’ to the legal

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156 (1996) 186 CLR 404, citing *Compañía General de Tabacos de Filipinas v Collector of Internal Revenue* 275 US 87, 100 (Wendell Holmes J, Brandeis J concurring) (1927).

profession are susceptible to critique. Empirical research into the practice of the tax system may undermine the projection of legitimate law emerging from legitimate (accountable) legislative processes that is central to legal positivism. Empirical study might also explore the experience of tax practitioners who daily confront what they perceive to be indeterminate law. If tax practitioners, like many judges that have dissented or been overturned on appeal, can get the law 'wrong', does the positivist claim of one right interpretation hold true or is it a convenient myth? Such theoretical and empirical research, along with other sociological factors such as the recurrence of crisis, may ultimately see the dethroning of the narrow brand of positivism that externalises 'tax ethics' from the practise of taxation law.