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Abstract
[Extract]
Much thinking about law is conducted within a dualistic paradigm[1] and it would be fair to say that most discussion of statutory interpretation is no exception. Over the past several centuries vast amounts of ink have been spilt on the vexed question of statutory interpretation.[2]Mainstream discourse on statutory interpretation in Australasia perpetuates the perception that this jurisprudential challenge is a two horse race – readers are given a choice between literalism and purposive interpretation.[3]

Keywords
taxpayer, Part IVA, law

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Dr Mark Burton, Law School, University of Canberra. I am grateful to two anonymous referees for their comments upon a draft version of this article. The usual caveat applies – all mistakes and omissions are all of my own doing.

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THE RHETORIC OF TAXATION INTERPRETATION AND THE DEFINITION OF 'TAXPAYER' FOR THE PURPOSES OF PART IVA*

*Mark Burton**

1 Introduction

Much thinking about law is conducted within a dualistic paradigm[1] and it would be fair to say that most discussion of statutory interpretation is no exception. Over the past several centuries vast amounts of ink have been spilt on the vexed question of statutory interpretation.[2] Mainstream discourse on statutory interpretation in Australasia perpetuates the perception that this jurisprudential challenge is a two horse race – readers are given a choice between literalism and purposive interpretation.[3] Both interpretive theories are consistent with the rule of law because under both theories judges are perceived to be insulated from the political realm of government by virtue of the fact that they merely adopt authorized interpretive

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1 Thus, for example, Duncan Kennedy adopts the internal language of the law in analyzing the dichotomous nature of many legal principles: Duncan Kennedy, 'Form and Substance in Private Law Adjudication' (1976) 89 *Harvard Law Review* 1685. For a critique of the critical legal studies 'movement' for its failure to move beyond this dichotomous conceptualization of the law, see Alan Hunt, 'The Theory of Critical Legal Studies' (1986) 6 *Oxford Journal of Legal Studies* 1.

2 DC Pearce and RS Geddes, *Statutory Interpretation in Australia* (Butterworths, 4th ed, 1996) 21ff. The authors briefly refer to the vast literature regarding interpretive theory at pp 20-1.

3 See, for example, Tobias Lonnquist, 'The Trend Towards Purposive Statutory Interpretation: Human Rights at Stake' (2003) 13 *Revenue Law Journal* 18, 19; John Burrows, 'The Changing Approach to the Interpretation of Statutes' (2003) 33 *Victoria University of Wellington Law Review* 981; Justice Bryson, 'Statutory Interpretation: An Australian Judicial Perspective' (1992) 13 *Statute Law Review* 187; Justice Bryson, Statutory Interpretation (1992) 8 *Australian Bar Review* 185; Johan Steyn, 'The Intractable Problem of the Interpretation of Legal Texts' (2003) 25 *Sydney Law Review* 5; JJ McGrath, 'Reading Legislation and Ivor Richardson' (2003) 33 *Victoria University of Wellington Law Review* 1017; Geoffrey de Q Walker, *The Rule of Law: Foundation of Constitutional Democracy* (Melbourne University Press, 1988) 34.

procedure in discovering and applying the one preexisting, objective meaning of legislation. I call this aspect of the rule of law the 'determinacy thesis'.[4]

The dearth of Australasian legal literature offering accounts of statutory interpretation other than literalist or purposive paradigms illustrates the intellectual insularity of the legal profession. For at least two millennia philosophers have considered the nature of language and communication, grappling with a diverse array of language theories which move well beyond literalism and purposive interpretation.[5] However, such philosophical discourse raises barely a ripple in the Australasian legal pond.[6] The concentration upon just two of many interpretive theories of statutory interpretation is particularly pronounced in the Australasian taxation literature, where it seems the tax academy is more or less insulated from alternative interpretive paradigms.[7] Indeed, in

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4 Some call this aspect of the rule of law 'legal formality': Duncan Kennedy, 'Legal Formality' (1976) *Journal of Legal Studies* 351.

5 For an overview of literary theory see Terry Eagleton, *Literary Theory* (2nd ed, 1996, Oxford).

6 For exceptions to this general rule see: Jeffrey Barnes, 'Statutory Interpretation, Law Reform and Sampford's Theory of the Disorder of Law' (Pt 1) (1994) 22 *Federal Law Review* 116; 'Statutory Interpretation, Law Reform and Sampford's Theory of the Disorder of Law' (Pt 2) (1995) 23 *Federal Law Review* 77; Stephen Bottomley and Suzanne Corcoran, *Interpreting Statutes* (Federation Press, 2005).

7 See, for example, Woellner, Barkoczy, Murphy, Evans, *Australian Taxation Law* (15th ed, CCH, 2005) 40ff. Natalie Lee, 'A Purposive Approach to the Interpretation of Statutes?' (1999) 20 *Statute Law Review* 131; R Krever, 'Taming Complexity in Australian Income Tax' (2003) 25 *Sydney Law Review* 467. For an earlier expression of a similar view see; Rick Krever, 'Avoidance, Evasion and Reform: Who Dismantled and Who's Rebuilding the Australian Income Tax System?' (1987) 10 *UNSW Law Journal* 215. See also: Robert Allerdice, 'The Swinging Penduluum: Judicial Trends in the Interpretation of Revenue Statutes' (1996) 19 *University of New South Wales Law Journal* 162; DG Hill, 'How is Tax to be Understood by Courts' (2001) 4 *The Tax Specialist* 226; DG Hill, 'A Judicial Perspective on Tax Law Reform' (1998) 72 *Australian Law Journal* 685, 687; D Goldberg, 'Between the Taxpayer and the Executive: Law's Inadequacy; Democracy's Failure?' [1996] *British Tax Review* 9, 11; Douglas Brown, 'The Canons of Construction of Taxation and Revenue Legislation' [1976] 6 *Australian Tax Review* 81; G Davies, 'The Role of Courts in Construing the Income Tax Assessment Act' (1980) 15 *Taxation in Australia* 749; Yuri Grbich, 'New Foundations of the Australian Tax System' (1987) 10 *UNSW Law Journal* 125, 135; Brian Nolan and Tom Reid, 'Re-writing the Tax Act' (1994) 22 *Federal Law Review* 448, 454; Braithwaite argues for a rules and principles approach which effectively combines literal and purposive theory: J Braithwaite, 'Making Tax Law More Certain' Centre for Tax System Integrity, Working Paper No 44, ANU, 2002. However, there are exceptions: Geraldine Hikaka and John Prebble, 'Legal Autopoiesis and General Anti Avoidance Rules', paper delivered at 17th Annual Conference of the Australasian Tax Teacher's Association, 27 and 28 January, 2005, Victoria University of Wellington.

some mainstream tax literature, only the literal approach to interpretation is referred to.[8] If the legal profession in general is largely mesmerised by what some of its senior members have described variously as a 'myth' or a 'fairytale',[9] the tax fraternity seems fixated upon the literalist and purposive versions of the determinacy thesis.

The general purpose of this article is to continue the 'postmodern' theme of my earlier work,[10] challenging the mainstream literalist/purposive versions of the determinacy thesis. This earlier work argues that the process of interpretation is *inevitably* rhetorical, in that the interpreter has no option but to utilize any or all of a range of rhetorical interpretive devices in constructing an interpretation which is subjectively satisfying to them and, hopefully, to a broad cross-section of those reviewing the interpretation. Rather than adopting a theoretical approach to this topic, I present an analysis of the Full Federal Court decision in *Grollo Nominees Pty Ltd v FCT*.[11] This decision considered the meaning of 'taxpayer' for the purposes of the general anti-avoidance provisions within Part IVA of the *Income Tax Assessment Act* 1936. By adopting this case study methodology, I hope to illustrate how case decisions might be analysed from the 'law as rhetoric' perspective. More specifically I hope to illustrate the limitations of the essentially dualistic contemporary Australian

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8 Since the basic thrust of tax legislation is to collect part of an entity's earnings or profits, the courts developed a basic rule that any legislation imposing a tax was to be strictly interpreted or construed. As a result, it is also said that the legislation imposing tax must be expressed in clear and unambiguous language. Thus, to impose a tax, the legislation must be precisely expressed and indicate very clearly an intention for the tax to be imposed': *2005 CCH Master Tax Guide* (CCH, Sydney, 2005) 17. To similar effect, see Corcoran's suggestion that in interpreting taxation law 'more literal approaches to statutory interpretation may be invoked': Suzanne Corcoran, 'Theories of statutory interpretation' in Suzanne Corcoran and Stephen Bottomley, *Interpreting Statutes*, (Federation Press, 2005) 8, 29.

9 See, for example, Lord Reid, 'Judges as Law Makers' (1972) 12 *Journal of Public Teachers of Law* 22; see also MD Kirby, 'Judging: Reflections on the Moment of Decision' (1999) 18 *Australian Bar Review* 1, 8. For a discussion of legal mythology see: Peter Fitzpatrick, *The Mythology of Modern Law* (Routledge, London, 1992).

10 Mark Burton, 'The Rhetoric of Tax Interpretation – Where talking the talk is not walking the walk', paper delivered at 17th Annual Conference of the Australasian Tax Teacher's Association, 27 and 28 January, 2005, Victoria University of Wellington; 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; Mark Burton, 'Determinacy, Indeterminacy and Rhetoric in a Pluralist World' (1997) 21 *Melbourne University Law Review* 544; Mark Burton, 'The Song Remains the Same - The Search for Interpretive Constraint and the Rhetoric of Legal Theory in Hart and Hutchinson' (1997) 20 *University of New South Wales Law Journal* 407.

11 *Grollo Nominees Pty Ltd v FCT* 97 ATC 4585 ('*Grollo*').

interpretive theory and also illustrate why much postmodern literature upon interpretation fails reflexively. In doing so, I hope that others will pick up the challenge and analyse case decisions from the law as rhetoric perspective. Further, I hope that recognition of the essentially subjective process of statutory interpretation will engender debate about how we might adapt our legal institutions to cater for this subjective interpretive process. Although a full consideration of such institutional reforms is beyond the scope of this paper, I will outline some issues which must be addressed if judges and administrators really are, in a sense, making law.

My second specific purpose in writing this paper is to analyse the weaknesses of the definition of 'taxpayer' for the purposes of the general anti-avoidance provisions in Part IVA of the *Income Tax Assessment Act* 1936.[12]

2 Overview of interpretive theory

This section of the paper is not intended to offer a complete discussion of interpretive theory, as I have attempted a fuller appraisal of interpretive theory elsewhere.[13] Suffice it to say that the two mainstream accounts of statutory interpretation are grouped under the labels 'literalism' and 'purposive interpretation'. Often such labels are used by authors without any elaboration upon their meaning.[14] As a result, it is often not possible to be sure that one commentator's understanding of 'literalism' is identical to another's. Thus, for example, Krever's discussion of literalism appears to refer to the process by which a taxpayer's circumstances are characterized – fact formalism – as opposed to the process by which the meaning of a text is ascertained.[15]

2.1 Interpretive theories of determinate law.

Despite the vagaries of such fundamental terms, it would be fair to say that there are three common understandings of 'literalism':

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12 To the best of my knowledge, this analysis has not been undertaken elsewhere in the published literature dealing with Part IVA.

13 See especially Burton, 'The Rhetoric of Tax Interpretation – Where talking the talk is not walking the walk', above n 10.

14 For a good exposition of the various permutations of 'strict construction' and 'literalism' in the context of the law of the United States of America, see Morell E. Mullins, 'Coming to terms with strict and liberal construction' (2000) 64 *Alb L Rev* 9.

15 Krever, 'Taming Complexity in Australian Income Tax', above n 7, 476-7.

1 The practice of interpreting legislation according to the 'literal' meaning of the words.[16] This mechanistic understanding of how the meaning of a text is ascertained is based in referential,[17] formalist[18] or analytic[19] language theories which maintain that each word has an assigned and finite meaning. With finding the meaning of statutory words merely a matter of using a good dictionary to 'join the dots', this understanding of literalism implies that interpretation is a mechanical exercise;[20]

2 Sometimes commentators and judges refer to 'strict literalism',[21] although it is unclear what the adjective 'strict' adds to the concept of 'literalism' as the one literal meaning of words envisaged under the first permutation of 'literalist' theory seemingly would be absolute. However, 'strict literalism' is generally understood as something akin to the contra proferentum rule – interpreting the statutory rule against the architect of the rule such that nothing is read in and nothing is read out of the rule.[22] Whether or not this approach adds anything to the first understanding of literalism, being labeled a 'strict literalist' has assumed pejorative connotations;[23]

3 Finally, literalism is taken to refer to the practice of identifying the meaning of the legislative text within its statutory context, which

16 The classic judicial statement of which may be seen in *The Cape Brandy Syndicate v Inland Revenue Commissioners* [1921] 1 KB 64, 71.

17 JS Mill, *A System of Logic* (1947) 48-9.

18 For one prominent formalist theory of language see: Ferdinand de Saussure, *Course in General Linguistics* (McGraw Hill, London, 1966); for a critique of which see Peter Goodrich, *Legal Discourse - Studies in linguistics, rhetoric and legal analysis* (Macmillan, London, 1987) 17-31.

19 See, for example, Gottlob Frege, 'On Sense and Reference', in Max Black and P.T. Geach (eds) *Translations from the Philosophical Writings of Gottlob Frege* (Basil Blackwell, Oxford, 1952), 56-78; for discussion of this see Christopher Norris, 'Sense, Reference and Logic' in *The Contest of Faculties* (Methuen, 1985) 47-68.

20 For a critical appraisal of the origins and linguistic theory underlying this account of statutory interpretation see: Peter Goodrich, *Legal Discourse* (Macmillan, London, 1987) ch 2.

21 See, for example, John Ward, *De Rothschild v Lawrenson* [1994] *British Tax Review* 250.

22 For a recent description of this approach, without adoption of the 'strict literalism' appellation, see Jim Corkery, 'On Literalism, Rule of Law and Due Process' (2003) 13 *Revenue Law Journal* 1.

23 *FCT v Westraders Pty Ltd* (1980) 144 CLR 55, 80 per Murphy J.

entails consideration of the impact upon the literal meaning of the words of the particular statutory context. This understanding of literalism implicitly acknowledges that words will often have more than one meaning, and that the appropriate meaning will depend upon the context in which the word is found. Thus, in what is taken to be one of the classic Australian statements of the literalist approach, his Honour Higgins J stated:

> The fundamental rule of interpretation, to which all others are subordinate, is that a statute is to be expounded according to the intent of the Parliament that made it: and that intention has to be found by an examination of the language used in the statute as a whole. The question is, what does the language mean; and when we find what the language means, in its ordinary and natural sense, it is our duty to obey that meaning, even if we think the result to be inconvenient or impolitic or improbable.[24]

The reference to interpreting 'the legislation as a whole' is significant, as it emphasises the importance of the statutory context to the interpretive inquiry.[25] According to this third understanding of literalism, the terms of the legislation as a whole are the proper focus of judicial attention and the consideration of matters beyond the four corners of the legislative text are to be ignored or treated with considerable suspicion. This emphasis upon the statutory text is also the basis of one version of purposive interpretive theory. Thus, for example, his Honour Justice Kirby observes that his views may differ from those of his brethren because of the 'more insistent demand that I feel to ascertain, and give effect to, the legislative purpose as I see it in the language under consideration.'[26] Here literalism and one form of purposive theory

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24 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129, 161-2; with the exception of the concluding clause, this statement of principle was accepted as a correct statement of the law by Mason and Wilson JJ in *Cooper Brookes (Wollongong) Pty Ltd v FCT* 81 ATC 4292, 4305; (1981) 147 CLR 297.

25 In the United States of America this form of literalism has been promoted by Justice Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Princeton University Press, 1997). For a critical reading of Scalia's work see William D Popkin, 'An "Internal" Critique of Justice Scalia's Theory of Statutory Interpretation' (1992) 76 *Minn L Rev* 1133.

26 Kirby, above, n 9, 19; in the same way, Sir Ivor Richardson appears to ground his purposive construction upon the 'scheme of the legislation' evident from the statutory text: Sir Ivor Richardson, 'Appellate Court Responsibilities and Tax Avoidance' (1985) 2 *Australian Tax Forum* 3, 9; Sir Ivor Richardson, 'Reducing Tax Avoidance by Changing Structures, Processes and Drafting' in Graeme Cooper (ed), *Tax Avoidance and the Rule of Law* (IBFD, Amsterdam, 1997) 327.

coincide as they focus upon the terms of the legislation with a view to ascertaining the express intention of the legislature.

Although many contemporary judges disavow 'strict literalism', many judges appear to adopt a textualist approach to statutory interpretation which is consistent with the third understanding of 'literalism' outlined above. Even some 'activist' judges concede that such textualism has its place in the judicial skill set. For example, Lord Steyn apparently endorses an activist approach to adjudication in the case of statutory interpretation, but observes that 'fiscal legislation may sometimes require a stricter approach than social welfare legislation'.[27] To similar effect, the former Chief Justice of the High Court of Australia, Sir Anthony Mason commented:

> In the case of statutes which impinge upon fundamental values, it is possible to say that an unambiguous and unmistakeable expression of intention is required to justify an interpretation which trenches upon the values. To insist upon the expression of such an intention is to enhance the legislative process by compelling those who introduce legislation to make plain to the legislature what the effect of the legislation will be.[28]

Purposive interpretive theory is understood in alternative ways,[29] and includes the following alternative descriptions:

1 The actual subjective purpose of the legislature;[30]

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27 J Steyn, 'The Intractable Problem of The Interpretation of Legal Texts' (2003) 25 *The Sydney Law Review* 5, 8.

28 Personal communication from Sir Anthony Mason to Professor John Braithwaite, quoted in John Braithwaite, 'Community Values and Australian Jurisprudence' (1995) 17 *Sydney Law Review* 350, 366. Without expressly considering the alternative definitions of literalism, Sir Anthony had indicated in an earlier article that he considered that the construction of tax legislation entailed consideration of the entire statute: Sir Anthony Mason, 'Where Now?' (1975) 49 *ALJ* 570 at 574. For the proposition that interpretation of statutes 'more readily lend themselves to a legalistic approach', but that there has been a trnd towards purposive interpretation, see Sir Anthony Mason, 'The Role of a Constitutional Court in a Federation' (1986) 16 *Federal Law Review* 1 at 5. See also DG Hill, 'How is Tax to be Understood by Courts', above n 7, at 232-3. His Honour notes that the difference of opinion with the Full Federal Court reflects the scope of judicial discretion with respect to statutory interpretation.

29 M Moore, "The Semantics of Judging" (1981) 54 *Southern California Law Review* 151, 270.

30 See, for example, DG Hill, 'A Judicial Perspective on Tax Law Reform' (1998) 72 *Australian Law Journal* 685 at 692 ('if earlier legislation has been the subject of court clarification and the terms of that legislation are repeated in consolidating legislation it is presumed *that*

2 The 'counterfactual purpose'[31] - what Parliament would have intended had they considered the application of the statute to a particular set of circumstances:

> If there is more than one possible construction open, think about the consequences which flow from each and ask what was it more likely that parliament intended. In doing this you will be doing just what the courts will have to do if the matter comes before them and your answer will most likely be right';[32] and

3 The objective purpose of the legislation (as part of the entire legislation of a jurisdiction[33] or the objective purpose of each particular provision within an Act of Parliament). For example, Justice Kirby indicates his resort to the purpose of the statute (drawing a distinction between the intention of parliament and the purpose of the statute).[34] Similarly, Sir Ivor Richardson accepted that his 'scheme of the legislation and purpose' approach would not always provide the right answer, however his Honour suggested that such an approach was 'likely' to produce the right answer.[35]

The third mainstream account of statutory interpretation is a combination of literalism and purposive theory. According to this approach, legislation must be interpreted in its context with a view to identifying the legislative intention. This combination of alternative theories of statutory interpretation may be seen in the joint judgment of Brennan CJ, Dawson, Toohey and Gummow JJ in *CIC Insurance Ltd v Bankstown Football Club Ltd*:[36]

Parliament intended to use the terms in the way which is consistent with the earlier case law.' {emphasis added})

31 Some refer to this branch of purposive construction as 'imaginative reconstruction'; William N Eskridge et al, *Legislation and Statutory Interpretation*, Foundation Press, New York, 2000 at 218-20.

32 DG Hill, 'How is tax to be understood by Courts' above n 7, 234.

33 Which might include reference to 'fundamental' legislative purposes, such as maintaining the integrity of the political system: see Max Radin, 'Statutory Interpretation' (1930) 43 *Harvard Law Review* 863, 867.

34 MD Kirby, above n 9, 19.

35 Sir Ivor Richardson, 'Appellate Court Responsibilities and Tax Avoidance' (1985) 2 *Australian Tax Forum* 3, 9; see also Sir Ivor Richardson, 'Reducing Tax Avoidance by Changing Structures, Processes and Drafting' in G Cooper, *Tax Avoidance and the Rule of Law* (IBFD, Amsterdam, 1997) 327.

36 (1997) 187 CLR 384.

> [T]he modern approach to statutory interpretation (a) insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise, and (b) uses "context" in its widest sense to include such things as the existing state of the law and the mischief which, by legitimate means such as those just mentioned, one may discern the statute was intended to remedy. Instances of general words in a statute being so constrained by their context are numerous. In particular, as McHugh JA pointed out in *Isherwood v Butler Pollnow Pty Ltd* [(1986) 6 NSWLR 363 at 388], if the apparently plain words of a provision are read in the light of the mischief which the statute was designed to overcome and of the objects of the legislation, they may wear a very different appearance. Further, inconvenience or improbability of result may assist the court in preferring to the literal meaning an alternative construction which, by the steps identified above, is reasonably open and more closely conforms to the legislative intent.[37]

The common thread linking these 'mainstream' accounts of statutory interpretation is that there is a finite, objectively ascertainable, answer to any interpretive question. Such accounts of statutory interpretation are therefore understood to be at least theoretically consistent with the rule of law proposition that law must be determinate.[38] Other interpretive theories fitting within this overarching determinacy thesis include Ronald Dworkin's broad hermeneutic theory,[39] Stanley Fish's narrower institutional hermeneutic theory[40] and Richard Posner's economic theory of statutory interpretation.[41] However, I will leave these interpretive theories to one side as they do not figure prominently in the mainstream interpretive literature, or at least the mainstream interpretive literature to do with Australian taxation.[42]

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37 Ibid 408. In support of the latter part of this statement, their Honours cited the decision of Mason and Wilson JJ in *Cooper Brookes (Wollongong) Pty Ltd v FCT* 81 ATC 4292; (1981) 147 CLR 297 320-1.

38 Geoffrey de Q Walker, above n 3.

39 Ronald Dworkin, *Law's Empire* (1986) viii-ix, 76-86, where Dworkin argues that the proper interpretation of legal doctrine provides one right answer which can only be determined at the time of judgment.

40 Stanley Fish, *Is there a text in this class?* (1980).

41 Richard Posner, *Economic Analysis of Law* (4th edn, 1992): [f]inally but more controversially, in areas where conventional methods of interpretation leave the judge in doubt, perhaps he should feel free to use his interpretive freedom to nudge the statute in the direction of efficiency' (at 530).

42 See the literature referred to above n 7.

2.2 Law and rhetoric

The argument that I have developed elsewhere[43] is that a fourth account of statutory interpretation is descriptively compelling, even if it is not normatively appealing in terms of the neat compartmentalization of governmental functions posited by liberal political theory.[44] This fourth account adopts what might be described as a 'postmodern' approach to statutory interpretation.[45] In broad terms postmodern interpretive theory challenges the various forms of the determinacy thesis upon the basis that there is no objective meaning of legal texts 'there', awaiting discovery by means of an authorized and objective interpretive method. Postmodern interpretive theory challenges the perceived objectivity of the interpretive process. According to postmodernist theory, the process of interpretation is shot through with subjective elements because it inevitably entails a choice between any number of possible meanings. The exercise of this choice, postmodern interpretive theory maintains, must ultimately be made upon arbitrary grounds. Postmodern interpretive theory therefore has two elements – the fact that language is polysemous and the fact that this polysemy can only be resolved by arbitrarily settling upon one meaning as the 'right' interpretation.

Polysemy arises because a particular word taken in isolation can convey various meanings[46] and, further, the context in which a specific word is found will often amplify the number of possible interpretations to be ascribed to that word.[47]

Psychoanalytic theory offers insight into the psychology of the interpretive process. Psychoanalytic theory suggests that an individual's subjective consciousness is fractured along multiple fault lines. Whereas Freud maintained that the individual

43 See the literature referred to above n 10.

44 Geoffrey de Q Walker, above n 3; G de Q Walker, *The Tax Wilderness: How to restore the rule of law,* Centre for Independent Studies, Melbourne, 2004; Joseph Raz, 'The Rule of Law and its Virtue' (1977) 93 *Law Quarterly Review* 195.

45 To define postmodernism is antithetical to the nature of postmodernism, because 'postmodernism rejects all forms of truth-claims; it accepts nothing as absolute; and rejoices in total relativism': Ziauddin Sardar, *Postmodernism and the Other* (Pluto Press, London, 1998) 8.

46 A proposition which is even recognized by 'mainstream' lawyers: DG Hill, 'A Judicial Perspective on Tax Law Reform', above n 7, 686.

47 For recognition of this from within the judicial mainstream see, for example, *Codelfa Constructions Pty Ltd v State Rail Authority of NSW* (1981-2) 149 CLR 337, 401 (Brennan J).

psyche generally reconciles such internal divisions, Lacan[48] suggested that an adult individual has no prospect of achieving such unity. Looking to the nature of language as a window into the human psyche, Lacan applied Saussure's[49] concept of 'differance' which holds that any word only assumes meaning from that which it is not. But as the meaning of all words is similarly defined by difference, it is impossible to ever arrive at the 'right' meaning of a particular term. Applying the concept of 'difference', Lacan suggested that an adult's consciousness is framed in symbolic terms, and the meaning of any symbol is only determined by having regard to what it does not mean. Thus, Lacan suggested, an individual must endlessly cycle from one approximate description of objective reality to another without having the ability to transcend this symbolic lifeworld.[50] Incapable of assuming an objective standpoint from which to assess the merits of competing standpoints, the mind is destined to endlessly cycle through alternative standpoints. Try as we might, there is no prospect of the mind resolving itself into one coherent whole.

In broad terms, then, postmodern interpretive theory therefore suggests that the 'meaning' of any particular text is in the eye of the beholder. As it is impossible for any individual to 'know' the meaning of a text, it is likewise impossible for any two individuals to agree upon an understanding of a text as they can never know the reality of their agreement. However, much postmodern legal theory ignores an explanation for why judges and lawyers grapple with legislation in a quest to identify meaning as if the meaning is '*there*'. Further, much postmodern literature fails reflexively because postmodern authors themselves write and speak as if they have meaning to convey – presumably a pointless exercise.[51] Are these instances of mass delusion or mass cynicism?

In an effort to resolve this shortcoming of postmodern interpretive theory, I have argued elsewhere[52] that all interpretation is deeply imbued with rhetorical devices which we draw upon in making sense of any text. This law as rhetoric account accepts the proposition that 'judges make up the law as they go', as one federal court

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48 J Lacan, Jacque-Alain Miller (ed), *The Seminar of Jacques Lacan Book II: The Ego in Freud's Theory and in the Technique of Psychoanalysis*, (S Tomaselli trans), (Cambridge University Press, 1988).

49 Ferdinand de Saussure, *Course in General Linguistics*, C. Bally and A. Sechehaye (eds), (McGraw Hill, 1966); for a critique of which see Peter Goodrich, *Legal Discourse - Studies in linguistics, rhetoric and legal analysis* (Macmillan, 1987) 17-31.

50 See, for example, J Lacan, above n 48, vol 2, 166; for an introduction to the significance of Lacan's work to literary theory see Eagleton, above n 5, 142ff.

51 For discussion of this limitation upon postmodernity's claim to 'grand theory' see Eagleton, above n 5, 202-3.

52 See the material referred to above n 10.

judge said to the author on several occasions.[53] It may be too strong to suggest that all judges are such cynical 'noble liars', in the sense of purporting to discover the determinate law while knowing all along that it is a mere pretence disguising judicial lawmaking in all cases. Nevertheless, 'law as rhetoric' maintains that judges are *inevitably* swayed by competing rhetorical discourses which underpin the law and legal institutions. Such discourses include the 'rule of law,'[54] prospective legal certainty, the legitimisation of the law and its legal institutions,[55] economic efficiency,[56] social equity[57] and deliberative legislative processes. The 'law as rhetoric' theory of judicial interpretation recognizes that such 'deep' rhetorical discourses are at the heart of the resolution of any interpretive issue and that the relative weighting of these discourses adopted by each judge will be unique in any particular case. This unique,

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53 Similarly, de Q Walker records that: 'At a gathering in Canberra in 1984 a High Court justice, who is a member of the usual majority on that court, said in front of several witnesses who included the writer that sociological and economic theories were of use in adjudication because they could be used to 'dress up' a conclusion already reached on other grounds'; de Q Walker, above n 3, 429 (n 48).

54 In earlier times some of those that attached a high priority to the rule of law denied that there was a tax avoidance crisis at all, suggesting that the existence of 'tax avoidance' was evidence that the rule of law was functioning in accordance with the standards of a society which valued individual freedom and property rights: A Shenfield, *The Political Economy of Tax Avoidance* (1968) 35. For elaboration of the content of the 'rule of law' generally see: de Q Walker, above n 3.

55 Lionel Murphy, 'The Responsibility of Judges' in Gareth Evans (ed) *Law, Politics and the Labor Movement* (1983) 5; Geoffrey Lehmann, 'Tax Reform in the Land of the Bunyip' [1986] *British Tax Review* 288, 291; *FCT v South Australian Battery Makers* 78 ATC 4412, 4427 (Murphy J); *FCT v Westraders* 80 ATC 4357, 4370 (Murphy J); Richard Krever, (Book Review) (1984) 10 *University of New South Wales Law Journal* 4, 6; Michael Binetter, 'The Interpretation of Part IVA after Gulland, Watson and Pincus' (1986) 21 *Taxation in Australia* 404, 414-15; Robin Speed, 'The High Court and Part IVA' [1986] *Australian Tax Review* 156, 156.

56 Posner, above n 41.

57 *FCT v Westraders* 80 ATC 4357, 4370 per Murphy J; Speaking after the passing of the perceived crisis, Lionel Murphy observed: 'The Court no longer encourages the tax avoidance industry - it is no longer regarded as the tax avoider's temple. The Court used to read Acts of Parliament absolutely literally - the words were all important - the spirit was often ignored. This made it easy for any competent lawyer or accountant to devise schemes to turn profits into tax losses. Because of this many of the rich ceased to pay tax and the burden fell on the workers and the scrupulous. This literal approach has been abandoned by the Court, which now adopts the correct judicial approach that Acts of Parliament should not be interpreted in a way which Parliament could never have intended.' Lionel Murphy, National Press Club Speech, 17 August 1983, quoted in Richard Krever, 'Murphy on Taxation' in Jocelynne Scutt, *Lionel Murphy: A Radical Judge* (1987) 128, 142.

subjective weighting of, often competing, social discourses means that judges will often disagree about the proper interpretive method to be applied and, even if they agree upon which interpretive method ought be applied, they may disagree upon how that method should be applied.

For example, one judge might interpret these discourses in such a way that she/he decides that the discourse of prospective certainty is central to the legitimation of the law, that prospective certainty enables economic actors to plan their respective futures with confidence that the law is determinate and that the deliberative processes of a democratically elected legislature are to be trusted to produce socially equitable outcomes, or at least more equitable outcomes than a resource-poor judge could ever hope to produce.[58] Having adopted such discourses as central to the resolution of a particular case, such a judge might consider that the 'literal' meaning of the legislation represents the best path to the true textual meaning. But, of course, a moment's reflection upon what judges and postmodernists alike have said suggests that the existence of the one true textual meaning is a myth. In applying the literal meaning of the legislation, the judge will again exercise considerable discretion not only in terms of identifying which understanding of literalism is adopted, but also in terms of determining the relative weights to be accorded contextual factors.

Another judge might accept that prospective certainty is important, but decide that the legislative purpose can be gleaned from the legislation with sufficient certainty that this principle is not breached. Alternatively, the same judge might acknowledge that prospective certainty is important, but decide that other discourses are more significant in the circumstances of the case at hand. For example, the judge might decide that a 'tax avoidance' case means that the legitimisation of the legal institutions is one critical aspect of the case – courts can ill afford to be perceived as being 'soft' on tax avoiders.[59] Further, such a judge might accept that the deliberative processes of parliament cannot be expected to be perfect and that the legislature may not have accurately expressed its (presumably finite) intention. Moreover, the judge might consider that allowing tax avoidance is contrary to the principle of social equity because tax avoidance is something primarily available to high income individuals.[60]

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58 Kirby, above n 9.

59 This appears to underpin the reference of the High Court to the benefit theory of taxation in *FCT v Spotless* 96 ATC 5201, 5206. For a discussion of the benefit theory of taxation see Graeme Cooper, 'The Benefit Theory of Taxation' (1994) 11 *Australian Tax Forum* 397.

60 Hence the significance of mass marketed tax minimization arrangements, which attracted a large number of relatively average taxpayers: Commonwealth of Australia, *Inquiry into Mass Marketed Tax Effective Schemes and Investor Protection*, Final Report of the Senate Economics References Committee, Parliament of Australia, Canberra, 2002.

The judge might also note the inefficiency arising out of policy settings which promote tax avoidance – the costs associated with tax avoidance arrangements represent a dead weight on the economy. This judge might therefore adopt a 'purposive' approach, but once again in doing so there will be a considerable discretion as to the method for identifying the relevant legislative purpose and also with respect to the application of that method to the particular legislative materials.

The most compelling aspect of the law as rhetoric account of statutory interpretation is that, by envisaging adjudication as a rhetorical process, we are able to explain why highly trained judges can disagree about what is often portrayed as a mechanical/scientific process – the application of 'the legal method' to the resolution of legal problems. Further, the law as rhetoric account explains why perhaps many judges honestly believe that they are discovering determinate law – they have adopted the rule of law discourse and believe that the answer that they arrive at is the 'right' answer. If this judge is subsequently overturned on appeal or finds herself to be a dissentient from a majority opinion, this is explained in terms of the fallibility of humanity. Law and rhetoric explains such interpretive disagreement in terms of reliance upon different discourses or different weights being accorded to the same discourses, rather than in terms of judges applying the wrong method and thereby arriving at the 'wrong' answer. Further, understanding the rhetoric of law also explains why the same judge may depart from a stance adopted in an earlier case by reweighting the deep discourses underlying the body of law. Envisaging the interpretation of law as a rhetorical process therefore means that there is no one right answer to an interpretive problem, although there may be an answer which wins stronger support at a particular point in time by virtue of its appeal to a range of rhetorical discourses underpinning the law and legal institutions.

Recognition of the rhetorical aspect of interpretation explains why even those who question the determinacy thesis think and speak as if there is one true meaning of a particular text - the belief in the efficacy of communication seems almost as deeply embedded as the will to live. The claim to have discovered the one true meaning of a text is a powerful rhetorical device which we all (this author included) rely upon on a daily basis. In the legal context – judges, lawyers, administrators and legal subjects alike grapple with the competing rhetorical discourses embedded within legislation and ultimately opt for an interpretation which seems more convincing at a particular point in time. This more convincing interpretation is labeled the 'right' interpretation by the self-satisfied judge who smiles as they put down their pen. A judgment is therefore both a record of the process in which a judge seeks to convince themselves of the veracity of their judgment and an attempt to win others over to the particular interpretation adopted in the judgment. In this respect there is little difference

between a legislator and a judge – both are hoping to win widespread support for their respective actions and both must do so by engaging with the rhetorical discourses which underpin any community.

A theory of law as rhetoric therefore purports to describe what judges are already doing, rather than what they ought to do in a normative sense. The thought of unelected judges making law may be nightmarish[61] to those who promote the normative value of the rule of law,[62] and so it is perhaps understandable that many want to believe that judges actually do not make law. However, law and rhetoric merely purports to offer an accurate portrayal of what judges are actually doing. Further, this descriptive account suggests that the failure of judges to implement interpretive methodology which achieves legal determinacy is not a function of poor judicial training, aberrant judicial behaviour or some other form of judicial 'error'.[63] Rather, law and rhetoric suggests that political discourse inevitably spills over from the legislative sphere into the juridical sphere. What a particular society does in response to this reality, in terms of shaping its legal institutions, is not a subject of law as rhetoric theory, although it obviously raises questions about how legal institutions and rules should be adapted to cater for the uncertainty of law.[64]

3 The interpretive problem - definition of 'taxpayer' in Part IVA of the Income Tax Assessment Act 1936

In an earlier paper I have outlined some of the rhetorical devices which may be discerned in various judgments.[65] However, in that paper I did not offer a close analysis of a particular case to illustrate the way in which an array of rhetorical devices can be assembled in justifying a particular conclusion. In the second part of this paper I propose to apply this 'law and rhetoric' approach in analysing the decision of the Full Federal Court in *Grollo.* That decision dealt with the meaning of 'taxpayer' for the purposes of Part IVA of the *Income Tax Assessment Act* 1936. The purpose of this part of the paper is therefore to illustrate how a theory of interpretation grounded in law as rhetoric enables a deep critical analysis of a case

61 HLA Hart, 'American Jurisprudence Through English Eyes: The Nightmare and the Noble Dream' (1983) 11 *Georgia Law Review* 969.

62 De Q Walker, above n 3.

63 Dworkin, *Law's Empire* (1986) 265.

64 J Dabner, 'There are too many witch doctors in our courts', paper presented at 17th Annual Conference of the Australasian Tax Teacher's Association, 27 and 28 January, 2005, Victoria University of Wellington.

65 Burton, 'The Rhetoric of Tax Interpretation – Where talking the talk is not walking the walk', above n 10.

decision. Further, this part of the paper lays the foundation for the following part of the paper, which considers the relative descriptive force of alternative versions of literalist and purposive interpretive theories.

3.1 What was the interpretive issue in *Grollo*?

Part IVA applies, *inter alia*, with respect to schemes entered into for the dominant purpose of obtaining a tax benefit for a 'taxpayer'.

3.1.1 The section 6(1) definition of 'taxpayer'

For the general purposes of the ITAA, 'taxpayer' is defined in sec 6(1) to *mean*, unless the contrary intention appears, 'a person deriving income or deriving profits or gains of a capital nature'. This is a broad definition in the sense that it is not restricted to persons who are actually obliged to pay tax – a person will be a 'taxpayer' as long as they are deriving income or deriving profits or gains of a capital nature. By virtue of ITAA 1997 section 995-1 and subsections 6-5(4) and 6-10(3), a person will be taken to have derived an amount where it is applied or dealt with on their behalf or as they direct. Notably, however, even after taking account of this 'constructive receipt' extension to the ordinary understanding of 'derived', under this definition a person will only be a 'taxpayer' if they are *deriving* a sum of income or profits or gains of a capital nature. It is therefore possible for a person to have alienated all of their income to another entity such that they will not be a 'taxpayer' within the ordinary meaning of the term.[66] For example, a 'Tupicoff' situation transacted overnight on 30 June would potentially enable the relevant person to cease being a 'taxpayer' for the purposes of section 6(1).[67]

3.1.2 The section 177A(1) definition of 'taxpayer'

For the purposes of Part IVA, 'taxpayer' is defined *inclusively* in section 177A(1), which states that 'taxpayer' includes a person in a trustee capacity. The relevant Explanatory Memorandum[68] explained the reason for this specific inclusion:

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66 Because they will not have 'derived' income.

67 *Tupicoff v FCT* 84 ATC 4851. In this case the taxpayer engaged in a 'Friday/Monday' transaction, whereby he ceased employment as an insurance agent employed directly by an insurer and immediately thereafter provided his personal services to the same insurer through the artifice of a family trust. In such cases it would be possible for the natural person to arrange their affairs such that they do not derive any income.

68 Explanatory Memorandum accompanying *Income Tax Laws Amendment Act (No 2)* 1981 (Cth).

> The definition of "taxpayer" in sub-section (1) as including a taxpayer in a trustee capacity is designed to refer to those situations where a trustee is - for example, under section 99 or 99A of the Principal Act - subject to tax in respect of some or all of the net income of a trust estate. The definition will make it clear that Part IVA can be applied in such a case.

3.1.3 The specific interpretive issue arising from the two definitions of 'taxpayer'

The issues arising from these definitions of 'taxpayer' are:

1. whether, for the purposes of Part IVA, the definition in section 177A(1) excludes the operation of the definition of 'taxpayer' in section 6(1), given that section 177B(1) states that nothing outside of Part IVA in the ITAA is to limit the operation of Part IVA; and

2. regardless of the answer to point 1, whether it is possible for a taxpayer to structure their affairs so that they fall outside of the definition of 'taxpayer' for the purposes of Part IVA.

3.1.4 The relevance of the Grollo decision to the interpretive issue

In the only case decision which dealt with the definition of 'taxpayer' in this context, the Full Federal Court decided in *Grollo* that a 'taxpayer' for the purposes of Part IVA included a trustee, despite the fact that in many cases a trustee does not derive income. The Full Federal Court decided that a textualist approach to statutory construction was to be preferred to a purposive approach which emphasized statements in the extrinsic materials. The Court noted the explanatory memorandum accompanying the *Taxation Laws Amendment Act* 1981, which suggested that the express inclusion of trustees within the concept of a taxpayer was necessary because of the prospect that trustees might be assessed to tax independently of trust beneficiaries.[69] However, the Court considered that restricting Part IVA to those cases where the trustee was a taxpayer would be nonsensical. Accordingly, the Court purported to decide that the statutory text should prevail over the indication of the legislative purpose gleaned from the relevant extrinsic materials.

3.2 Why choose this interpretive issue?

There are a number of reasons for selecting this interpretive issue as the subject of this paper, including:

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69 See, for example, ITAA36 ss 98, 99.

1. the widespread social concern with respect to 'tax avoidance'[70] at the time that Part IVA was introduced was such that these provisions were perceived as critical to the importance of controlling 'tax avoidance';[71]
2. the central importance of the concept of a 'taxpayer' to the operation of Part IVA as a result of the necessity of identifying the correct entity for the purposes of making a determination under section 177F;
3. given points one and two, it would be reasonable to expect that the definition of 'taxpayer' would have been subjected to rigorous consideration in the course of drafting Part IVA, itself apparently the subject of considerable effort. In his Second Reading Speech, the then Treasurer the Hon John Howard observed that Part IVA was the product of 'much careful and difficult work carried out to establish appropriate provisions to deal in a general way with the sort of artificial schemes of tax avoidance with which of recent times we have become only too familiar.' This suggests that the assumption of a thoroughgoing deliberative legislative process, which underpins a literalist interpretation,[72] is at least valid in this case, even though it may not be valid with respect to other legislation;
4. the fact that Part IVA encapsulates a compromise between many competing discourses, including the rule of law and its determinacy thesis,[73] the perceived need for administrative flexibility in dealing with 'blatant' tax avoidance,[74] to the discourse of social equity and the portrayal of the

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70 In the 1960's a tax reform booklet had been commissioned by the Social Science Research Council in response to the limited terms of reference conferred upon the Ligertwood Committee. The report that emerged depicted a tax system riddled with loopholes: RI Downing, HW Arndt, AH Boxer and RL Mathews, *Taxation in Australia: Agenda for Reform* (1964). For another early discussion of the problems confronting the income tax systems of Australia and New Zealand, see: I Richardson, *Attitudes to Income Tax Avoidance* (1967) 13. For recognition of the shortcomings of the tax system in the 1970's see, for example, Yuri Grbich, 'The Duke of Westminster's Graven Idol on Extending Property Authorities into Tax and Back Again' (1978) 9 *Federal Law Review* 185, 210-11. See also, for example, Richard Krever, 'Avoidance, Evasion and Reform: Who Dismantled and Who's Rebuilding the Australian Income Tax System?' (1987) 10 *University of New South Wales Law Journal* 215; Justice JM Macrossan, 'Judicial Interpretation' (1984) 58 *Australian Law Journal* 547, 551.

71 Yuri Grbich, 'Anti-Avoidance Discretions: the Continuing Battle to Control Tax Avoidance' (1981) 4 *UNSW Law Journal* 17.

72 Upon the basis that the legislature should be taken to have said what it means, and so there is no need for recourse to extrinsic materials in ascertaining the legislative intention.

73 The perceived conferral of a broad discretion upon the Commissioner of Taxation has been criticized as anathema to the rule of law: de Q Walker, above n 3; for a more humorous depiction of the perceived threat to the rule of law posed by Part IVA see: Neil Forsyth, 'The Bank Manager and the Big Black Dog' (1991) 20 *Australian Tax Review* 107.

74 Grbich, above n 71.

payment of taxation as a 'badge of honour'[75] as against the perceived entitlement of every person to 'legitimately' minimize their tax;[76]

5. the lack of detailed consideration of this issue in the substantial body of literature upon Part IVA; and
6. the fact that there is a unanimous case decision of the Full Federal Court which focused upon the definition of 'taxpayer'.[77]

4 The Grollo decision – a deconstruction of judicial rhetoric

4.1 The Full Federal Court's decision

In Grollo a trustee ('Grofam') purported to retrospectively amend a joint venture agreement with a view to alienating the trustee's share of the joint venture proceeds to an associated company ('Grollo') which was acting in a trustee capacity.
On appeal from an unreported decision of the Administrative Appeals Tribunal (Olney J), in the Full Federal Court counsel for the trustees argued that Part IVA could not apply to a trustee. This argument was based upon the following propositions:

1. although subsection 177A(1) specifically stated that a reference to a 'taxpayer' in Pt IVA includes a reference to a taxpayer in the capacity of a trustee, counsel noted that this inclusive definition had to be read in light of the definition of 'taxpayer' expressed in ITAA36 s 6(1);
2. the definition of 'taxpayer' in section 6(1) was restricted to entities which derived income or derived profits or gains of a capital nature; and
3. counsel argued that the trustees in this case did not 'derive any income or profits or gains of a capital nature', and so Part IVA could not apply.

In concluding that Part IVA could apply to a trustee, the Full Federal Court (Sheppard, Foster and Whitlam JJ) stated that:

1. the definition of 'taxpayer' in subsection 6(1) is apt to include a taxpayer who derives income but nevertheless does not pay tax;[78]

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75 'Every tax, however, is to the person who pays it a badge, not of slavery, but of liberty. It denotes that he is subject to government, indeed, but that, as he has some property, that he cannot himself be the property of a master.' Adam Smith, *An Inquiry into the Nature and causes of the Wealth of Nations*, R H Campbell, A S Skinner, W Todd (eds), (1976) 825.

76 *IRC v Duke of Westminster* [1936] AC 1, 19; *FCT v Westraders* (1980) 144 CLR 55, 61.

77 *Grollo Nominees Pty Ltd v FCT* 97 ATC 4585.

78 Ibid 4619.

3. the inclusive definition of 'taxpayer' in section 177A is open to an interpretation which excludes the general definition of 'taxpayer' in subsection 6(1), but this interpretation should be rejected.[79] In arriving at this conclusion, their Honours observed that the definition in section 6 is exhaustive, while that in section 177A is not;
5. the conclusion that Part IVA could not apply to a trustee would be an extraordinary result; and
6. the members of the High Court in *Union-Fidelity Trustee Company of Australia Limited Pty Ltd & Anor v FCT*[80] made observations to the effect that ITAA36 s 95 implied that a trustee should be taken to be a 'taxpayer' for the purposes of the income tax. The Full Federal Court also noted the observation of the High Court in *FCT v Spotless Services Ltd,*[81] that Part IVA was a part of the ITAA36 and should be interpreted having regard to this context.

Upon the basis of these propositions, the Full Federal Court concluded that a trustee should be taken to be a 'taxpayer' for the purposes of Part IVA. The Court explained this conclusion:

> We have reached the conclusion that the submissions made on behalf of the appellants should be rejected. We appreciate that in doing so we may be departing from the apparent approach adopted in the explanatory memorandum to which we have referred. But for the reasons given, we think that course is required in the present case. The explanatory memorandum cannot be allowed to override what, upon analysis, is the clear intention of Parliament as ascertained from the language which it has used in the statute. Furthermore, although one needs to give effect to the definition of ``taxpayer'' in s. 6, one must not lose sight of the extended definition of ``taxpayer'' in Part IVA itself which, although expressed in inclusive terms, tends to confirm one in the view that Part IVA was intended to apply to trusts and trustees in all circumstances. We find it difficult to think that Parliament itself did not intend that that definition was to apply in the construction of the important provisions to be found in ss. 177C, 177D and 177F.[82]

The decision in *Grollo* therefore stands for the proposition that the definitions of 'taxpayer' in ITAA36 s 6(1) and 177A(1) are to be read as one and that a trustee is to be taken to derive income of the relevant trust estate such that the ITAA will apply to a trustee as if they are a taxpayer. Accordingly, Part IVA can apply to a trustee. Unfortunately, the Full Federal Court did not consider the relevance of section 177B(1)

79 Ibid 4619.
80 (1969) 119 CLR 117.
81 96 ATC 5201.
82 97 ATC 4585, 4624.

to this issue. In particular, the Court did not determine whether the requirement for derivation of income or profits or gains of a capital nature restricted the operation of Part IVA, such that section 177B(1) would exclude or modify the section 6(1) definition of 'taxpayer' in Part IVA cases.

4.2 Rhetorical devices used by the Full Federal Court

4.2.1 Claiming the 'ordinary' high ground – marginalizing competing interpretations

Having described the taxpayer's submissions with respect to the definition of 'taxpayer', the Full Federal Court observed that:

> It needs to be said that the acceptance of the submissions made on behalf of Grofam would lead to an extraordinary result. We would not ourselves lightly take the view that, when Part IVA was enacted, the legislature intended to bring about a situation under which the interposition of a trustee would, at least in cases which were governed by s. 97, invariably mean that Part IVA had no application, no matter that there was plainly a scheme to which Part IVA applied, a consequent tax benefit to the beneficiaries and the presence of the other conditions which must exist before Part IVA will apply. That must be the necessary consequence of the acceptance of the appellants' submission because the word ``taxpayer'' plays a critical role in the operation of ss. 177C, 177D and 177F. [83]

In adjudging the consequences of the taxpayer's submission 'extraordinary' the Full Federal Court appears to have adopted some ill-defined extralegal perspective from which to judge the 'extraordinariness' of the perceived consequences of a particular interpretation.

From the perspective of the rule of law, the 'extraordinariness' of a particular legal outcome must be judged from what Dworkin called the internal perspective – from within the confines of legal doctrine.[84] A statutory rule that 2 plus 2 equals five may be 'extraordinary' from the perspective of general mathematics, but there is nothing extraordinary about this rule if viewed from the internal perspective of a lawyer applying a validly created rule.[85] After all, there are many 'extraordinary' aspects of

83 ATC 4,623.

84 Dworkin, above n 39, 49.

85 Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution* (first published 1885, 5th ed, 1897). Of course, Dworkin argues that a law or legal decision may be

the income tax legislation which have not troubled the courts. For example, the rules regarding the alienation of income are based upon bizarre legal distinctions concerning the source and hence the character of particular income items. Why a sportsperson can alienate their personal endorsement income[86] but not their sporting income,[87] or why an author can alienate income arising from the assignment of copyright in text written 'on spec' while not with respect to assignment of copyright written under a prospective agreement[88] may have some logic from a legal perspective, but does not necessarily seem logical or 'ordinary' from other perspectives.[89]

By characterizing the perceived result of a particular interpretation as 'extraordinary', without defining the perspective from which this judgment was made, the Full Federal Court produced a stronger rhetorical effect. Here the Full Federal Court implicitly asserts that its conclusion is 'ordinary', challenging critics of the judgment to defend their 'extraordinary' standpoint. The onus therefore subtly shifts to the proponent of the 'extraordinary' interpretation to rebut that characterization, but the proponent is not in a position to offer a rhetorically convincing rebuttal because the foundation of that characterization is undefined.

4.2.2 Exaggeration

Further, it should be noted that the Full Federal Court appears to have embellished its interpretation with exaggerated claims regarding the perceived consequences of the taxpayer's alternative interpretation. The Full Federal Court considered that the taxpayer's interpretation would mean that Part IVA could only apply with respect to a trustee which was liable to pay income tax.[90] In all other cases, the Full Federal Court suggested, the result of the taxpayer's interpretation would be that Part IVA could not apply where there was a trust involved.[91] This claim is an exaggeration.

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extraordinary having regard to the scheme of principle evident within the authorised legal texts: Dworkin, above n 39, esp ch 9.

86 See Australian Taxation Office, Taxation Ruling IT2121, para 17; Explanatory memorandum accompanying the *New Business Tax System (Alienation of Personal Services Income) Act 2000*, para 1.27.

87 Ibid.

88 Australian Taxation Office, Taxation Ruling TR 2001/7, examples 13 and 14.

89 See, for example: Ross Parsons, 'Income Taxation – an Institution in Decay' (1986) 3 *Australian Tax Forum* 233; John Prebble, 'Income Taxation: a Structure Built on Sand', (2002) 24 *Sydney Law Review* 301.

90 *Grollo Nominees Pty Ltd v FCT* 97 ATC 4585, 4623.

91 Ibid.

Having regard to the context of the ITAA, generally trusts are ignored for taxation purposes and are taxed on a 'look-through' basis.[92] In general, trust income is taxed in the hands of the ultimate (non-trust) beneficiaries of the relevant trust. Thus, the context of Part IVA would suggest that the appropriate 'taxpayer' in cases involving trusts is the beneficiary or beneficiaries of the trust, not the trustee. This appears to have been the basis upon which the Commissioner proceeded in *FCT v Peabody*,[93] where Mrs Peabody was identified as the relevant taxpayer rather than the trustee of the Peabody family trust. Thus, to say that Grollo's suggested interpretation would mean that Part IVA would generally not apply to trusts is not necessarily right. Grollo merely argued that the relevant trustee was not a taxpayer – there was nothing preventing the Commissioner from raising Part IVA determinations with respect to the beneficiaries of Grofam even if those beneficiaries were 'taxpayers'.[94]

Further, the Full Federal Court appears to have contradicted itself, or at least undermined its own argument, by accepting that the result of Grollo's submission would be extraordinary in view of the fact that the trust beneficiaries would derive a tax benefit. This begs the question – if the trust beneficiaries have derived a tax benefit, what would prevent the Commissioner from canceling those tax benefits pursuant to his power under section 177F? Assuming that the trust beneficiaries were 'taxpayers', nothing would prevent the application of section 177F in such circumstances.

4.2.3 Elision

Another important rhetorical device is elision – omitting reference to material which may damage the rhetorical force of one's own argument.[95] Unless the reader approaches the questions at hand *de novo*, the reader can all too easily be 'lead up the

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92 For discussion of the taxation of trusts generally, and the now defunct proposal to impose taxation at the trust entity level, see John Glover, 'RBT "Option 2" – problems in concept and practice' (2001) 4 *Journal of Australian Taxation* 1. See also J Glover, 'Taxing Trusts: entity or conduit – an assessment' (1999) 2 *The Tax Specialist* 194.

93 94 ATC 4663.

94 Of course, the taxpayer may more readily discharge the onus of proving that a determination under section 177F was not correct by showing that there was no tax benefit because there was too much doubt as to whether a particular amount would reasonably have been expected to have been included in the taxpayer/beneficiary's assessable income: *FCT v Peabody* 94 ATC 4663. The decision in *Grollo* is therefore significant in that it accepts that the Commissioner may treat a trustee as if they are the relevant taxpayer, and thereby ignore any uncertainty regarding the existence of a tax benefit which might arise as a result of a trustee's discretion with respect to trust distributions.

95 For discussion of the concept of elision see Burton, 'The Rhetoric of Tax Interpretation – Where talking the talk is not walking the walk', above n 10.

garden path' by being inveigled into believing that the judgment is a comprehensive consideration of all aspects of the relevant interpretive question. Of course, it is possible that an omission is the result of a judicial oversight rather than a cynical rhetorical device. However, the more overt the issue that has been overlooked, the more likely that the omission is a rhetorical device. The *Grollo* decision exhibits a considerable degree of elision.

Omission of statutory provisions

Recall that the definition of 'taxpayer' in subsection 177A(1) states that 'taxpayer includes a *taxpayer* in the capacity of a trustee'. That is, for the specific inclusion of trustees within the concept of 'taxpayer' to apply, an entity must not only be a trustee to be a 'taxpayer' for the purposes of Part IVA, the trustee must also be a 'taxpayer'. The Full Federal Court appears to have ignored, or elided, this second requirement. In effect, the Full Federal Court rewrote the definition of 'taxpayer' in subsection 177A(1) to say 'taxpayer' includes a trustee'.

The reason that the Full Federal Court elided the reference to 'taxpayer' within the s 177A(1) definition of 'taxpayer' is that it appears to have accepted that the reference to 'taxpayer' could only be a reference to a 'taxpayer' within the meaning adopted in section 6(1). If this were correct, then the taxpayer's submissions would indeed mean that Part IVA could not apply to trustees because a trustee does not 'derive' income. However, as noted above, the Explanatory Memorandum explained the definition in subsection 177A(1) by noting that in some cases a trustee actually will be a 'taxpayer' in the ordinary sense of that term. For example, where a trustee is liable to taxation by virtue of section 99.

Whether by oversight or whether this is another instance of conscious elision, the Full Federal Court made no reference to section 177B. Subsection 177B(1) states that, subject to presently irrelevant exceptions, 'nothing in the provisions of this Act other than this Part or in the *International Tax Agreements Act 1953* or in the *Petroleum (Timor Sea Treaty) Act 2003* shall be taken to limit the operation of this Part'. This provision would suggest that, to the extent that the definition of 'taxpayer' in subsection 6(1) limited the definition of 'taxpayer' in subsection 177A(1), that definition should be ignored. I explore the significance of this aspect of the *Grollo* decision below.[96]

96 See text under '5.3 Concurrent operation of the two definitions?'

Elision – reference to case authority

As a result of their decision to ignore the Explanatory Memorandum and their decision that Part IVA must be interpreted in such a manner as to apply to all trustees, the Full Federal Court set about constructing an argument that all trustees were 'taxpayers' within the meaning adopted in section 6(1). In constructing this argument, the Full Federal Court referred to the decision of the High Court in *Union-Fidelity Trustee Company of Australia Ltd v FCT*,[97] observing:

> The relevance of the *Union-Fidelity* case is in the statements of general principle which we have cited from the judgments of Barwick CJ and Kitto J. Both judges refer to the trustee deriving the income. They do so because the provisions of s. 95 which define ``net income'' use the expression ``taxpayer'' thus directing one to the definition of that word in s. 6. The two judges have said what they have in the context of the case which they had to decide. But their statement serves to emphasise the fact that s. 95 itself treats a trustee of trust income as if he or she were a taxpayer in respect of that income.[98]

Notice here that their Honours made no mention of all of the relevant words of section 95. Section 95 defines 'net income of the trust estate' for the purposes of the trust 'code' within Part III Division 6 in these terms:

> Net income, in relation to a trust estate, means the total assessable income of the trust estate calculated under this Act as if the trustee were a taxpayer in respect of that income and were a resident, less all allowable deductions, except deductions under Division 16C or Schedule 2G and except also, in respect of any beneficiary who has no beneficial interest in the corpus of the trust estate, or in respect of any life tenant, the deductions allowable under Division 36 of the *Income Tax Assessment Act 1997* in respect of such of the tax losses of previous years as are required to be met out of corpus.

Section 95 clearly acknowledges that, in the normal course, a trustee will not be a 'taxpayer' – hence the need for the statutory assumption 'as if the trustee were a taxpayer'. The Full Federal Court's consideration of the statements of the High Court in *Union Fidelity* overlooks the fact that those statements were premised upon this statutory assumption. By ignoring the significance of this statutory assumption, the Full Federal Court in *Grollo* suggested that the *Union Fidelity* decision supported the conclusion that a trustee always will be a 'taxpayer' for the purposes of the ITAA. This conclusion begs the question of why the legislature considered it necessary to

97 (1969) 119 CLR 117.

98 *Grollo Nominees Pty Ltd v FCT* 97 ATC 4585, 4624.

insert the specific inclusive definition of 'taxpayer' into subsection 177A(1) – if a trustee is always a 'taxpayer', why specifically state that a trustee who is a taxpayer is a taxpayer? This is a question which the Full Federal Court ignored. It may be the case that the express inclusion of some trustees was inserted out of an abundance of caution, but the explanatory memorandum suggests otherwise.

Statutory context and elision

The Full Federal Court also bolstered its argument that section 95 meant that a trustee was a taxpayer for all of the purposes of the ITAA by reference to the High Court decision in *FCT v Spotless Services Ltd:*[99]

> It may be noted at this point that the judges who wrote the principal judgment of the High Court in *FC of T v Spotless Services Limited & Anor* 96 ATC 5201; (1996) 141 ALR 92 said (at ATC 5205; ALR 96) that Part IVA is as much a part of the statute under which liability to income tax is assessed as any other provision thereof.[100]

This reference to the statutory context of Part IVA, however, ignored the statutory scheme with respect to the taxation of trust income. That statutory scheme generally entails a 'look-through' approach with respect to the taxation of trust income rather than recognizing trusts at entity level.[101] With respect to Part IVA, this 'look through' approach would generally mean that a corporate beneficiary or natural person beneficiary(s) of a trust would be the relevant 'taxpayer(s)'. Indeed, this appears to have been the approach adopted by the Commissioner in *FCT v Peabody*,[102] where the Commissioner assessed Mrs Peabody as one of the trust beneficiaries rather than the trustee. It is because of this general statutory scheme that the statutory assumption in section 95, and the inclusion of taxpayers in the capacity of trustee in subsection 177A(1), were necessary.

By overlooking this statutory scheme, the Full Federal Court effectively assumed that the statutory assumption in section 95 and the specific inclusion in subsection 177A(1) were of no effect. While it is possible that statutory words are inserted *ex abunta*

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99 96 ATC 5201.

100 *Grollo Nominees Pty Ltd v FCT* 97 ATC 4585, 4624.

101 As s 97 generally provides for taxation at the level of the beneficiary rather than at the trustee level, an approach which would have been overturned had the now defunct entity taxation recommendation of the Review of Business Taxation been carried into effect. See Commonwealth of Australia, *A Tax System Redesigned*, Final Report of the Review of Business Taxation (Chair, John Ralph AO) AGPS, 1999, ch 11. For a discussion of entity taxation with respect to trusts see John Glover, above n 92.

102 94 ATC 4663.

cautela, this is a conclusion which should not be made lightly[103] – particularly where, as here, it is reasonable to expect that the statutory provisions were carefully and thoughtfully crafted.[104]

4.3 A consideration of the explanatory power of alternative literal and purposive theories in light of the Grollo decision

The preceding critique of the *Grollo* decision serves as a useful starting point for a consideration of the extent to which textualist and purposive theories of interpretation provide a convincing descriptive account of this decision.

As already noted, 'literalism' has been taken to refer to any of 'the literal meaning of the words', 'strict literalism' and 'the meaning of the words in their statutory context'. None of these descriptions of interpretive method is apt to explain the *Grollo* decision. Although the Full Federal Court indicated that it was applying the literal meaning of the statutory text,[105] the Court clearly ignored three parts of the legislation:

1. the reference to 'as if the trustee were a taxpayer' in section 95; and
2. the reference to 'taxpayer' within the section 177A(1) definition of 'taxpayer'; and
3. section 177B.

This suggests that the first two versions of literalist theory are inappropriate in describing the interpretive method adopted in *Grollo*. With respect to the third version of literalism, it is possible that consideration of the statutory context would mean that specific statutory words should be ignored. However, to do so would entail express consideration of the reasons for doing so. The Full Federal Court offered no reasons for ignoring the express terms of sections 95 and 177B. Further, as noted above, the statutory context suggests that trustees generally are not considered to be taxpayers because trusts are generally treated on a look-through basis. For these reasons the third version of literalism does not adequately describe the *Grollo* decision.

There are also three versions of purposive interpretive method – subjective legislative intention, counterfactual intention and the 'intention of the legislation'. The Full Federal Court did not purport to inquire into the subjective intention of the legislature nor did it inquire into what the legislature would have done had it been asked. The

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103 *Commonwealth v Baume* (1905) 2 CLR 405; *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 110 ALR 97, 102 (Mason CJ).

104 See the text under '3.2 Why choose this interpretive issue?'

105 *Grollo Nominees Pty Ltd v FCT* 97 ATC 4585, 4624.

Court purported to apply the third version of purposive interpretive method, identifying the purpose from the terms of the legislation. However, as detailed in the preceding paragraph, the failure to consider key components of the statutory text suggests that the Full Court did not actually seek the purpose behind the legislative text.

The Full Federal Court apparently proceeded upon the misapprehension that to find in favour of the taxpayer in this case would mean that Part IVA would not apply where a trust was the 'beneficiary' of a tax avoidance arrangement. The Court ignored the fact that the trust beneficiary(s) could be 'taxpayers'. The basis for this misapprehension is not evident in the legislation. Had the Full Federal Court adopted any of the 'mainstream' interpretive approaches described as literalism or purposivism, they could not have arrived at the conclusion ultimately adopted in the decision.

Further, it is most unlikely that *Grollo* represents an application of the *CIC Insurance* principle.[106] Once again, the failure to consider the express terms of the legislative text, as detailed above, takes this case outside the purview. It may be that this approach was what the Full Federal Court had in mind when it expressed the view that adoption of the taxpayer's argument would produce an 'extraordinary' result. As noted above, the judgment that the result was 'extraordinary' could only be founded upon some extra-legal assessment. However, the perspective from which this extra-legal assessment was undertaken was not made clear by the Full Federal Court. It is therefore most unlikely that the Full Federal Court applied this interpretive approach.

4.4 Was the decision in Grollo an aberration?

It might be suggested that the Grollo decision is aberrant, in that the Full Federal Court erred in failing to identify the 'right' interpretive path to the 'right' interpretive meaning. Thus, the foregoing case study might be dismissed upon the basis that it offers nothing to an analysis of other case decisions. It is beyond the scope of this paper to undertake more such case studies in an inductivist effort to prove the 'law as rhetoric' theorem. As noted in the introduction, the purpose of this paper is to illustrate the application of the 'law as rhetoric' perspective to case decision analysis, rather than to provide the 'proof' of the 'law as rhetoric' account. Nevertheless, it should be noted that the analysis of the Grollo decision, which indicates that judges utilize a broad range of rhetorical devices, is consistent with the reference to a broad range of interpretive devices in the extra-curial writing of judges.[107]

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106 See the text accompanying n 36.

107 For consideration of which see Burton, above n 10.

5 Lessons from the Grollo decision

5.1 The shortcomings of the definition of 'taxpayer' for the purposes of Part IVA

5.1.1 Limitations of the Section 6(1) definition of 'taxpayer'

It is possible that entities could fall outside of the meaning of 'taxpayer' for the purposes of Part IVA, either by fortuitous circumstances or by design. The Full Federal Court in *Grollo* accepted that the definitions of taxpayer in section 6(1) and 177A(1) should be read concurrently. The Court apparently accepted that the definition of 'taxpayer' in section 6(1) only applied where the relevant entity 'derived' income or profits or gains of a capital nature. Thus, an entity which does not derive receipts of the relevant types may not be a 'taxpayer' even if they pay tax or are obliged to pay the same. For example, an entity may need to include an item in assessable income as a result of a reimbursement.[108] In such circumstances it is possible that no income, profit or gain may have been 'derived', and so the entity will not be a 'taxpayer', despite the fact that they may be liable to pay tax upon the statutory income amount.

Further, the limited concept of 'taxpayer' adopted in section 6(1) suggests that an entity might escape the operation of Part IVA by entering into an arrangement which results in them not 'deriving' any of the relevant categories of benefit. For example, on this construction a taxpayer who alienated the entirety of 'their' income and/or capital profits or gains to an associated entity would not be susceptible to Part IVA.[109] Given that Part IVA was intended to counter some understanding of 'tax avoidance', it would be absurd for a taxpayer to be able to escape Part IVA by engaging in an arrangement which meant that they did not derive income or profits or gains of a capital nature. By contrast, just $1 of income would render the same person a 'taxpayer' and hence subject to Part IVA with respect to the alienated income.

5.1.2 Does section 177A adopt an 'ordinary' definition of 'taxpayer'?

It is possible that the definition of 'taxpayer' in section 177A was not intended to incorporate the definition of 'taxpayer' in section 6(1). Under this view, when the legislature stated that "'taxpayer' includes a taxpayer in the capacity of trustee", it intended to adopt the ordinary meaning of taxpayer.

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108 ITAA97 s 20-35.

109 Provided that the alienation was not undertaken in such a manner as to bring the amount within the constructive receipt rule in sections 6-5(4) or 6-10(3).

The *New Shorter Oxford English Dictionary* defines 'taxpayer' as 'a person who pays a tax or taxes; a person liable to taxation'. Similarly, the *Collins English Dictionary* defines 'taxpayer' as 'a person or organization that pays taxes or is liable to taxation'. If 'liable' is understood in the sense of 'susceptible, exposed or answerable', then an entity which is obliged to pay tax will be a 'taxpayer', even if they do not pay any tax, as they remain subject to the prospect of having to pay tax.

On this construction, the specific inclusion of trustees within the category of taxpayers could have been undertaken out of an abundance of caution. The Explanatory Memorandum accompanying the *Income Tax Laws Amendment Act (No 2)* 1981 indicates that the legislature was concerned to ensure that trustees liable to pay tax (under, for example, ITAA36 ss 99, 99A) would fall within the ambit of Part IVA. However, the ordinary meaning of 'taxpayer' would appear to have ensured this outcome in any case. Part IVA could apply to a trustee even though ITAA36 s 96 provides that 'except as provided in this Act, a trustee shall not be liable as trustee to pay income tax upon the income of the trust estate'. The mere fact that a trustee is susceptible to paying tax, albeit in limited circumstances, means that they are liable to pay income tax and therefore are a 'taxpayer' under the ordinary meaning of that term.

There are several unresolved issues with respect to the application of the ordinary definitions of 'taxpayer' in the context of section 177A. The nature of the taxes to be paid is not specified – is it to be implied that an entity is only a taxpayer if they pay or are liable to *income* tax? And must the tax be payable in Australia? It is possible that the payment of any tax in any jurisdiction would render a person a 'taxpayer' such that Part IVA could apply. Further, it is not clear whether an entity which is not required to pay income tax in the current year, but which has paid income tax in earlier years, is a 'taxpayer'.

Leaving these doubts to one side, if the definition of 'taxpayer' in section 177A is taken to adopt the ordinary meaning of taxpayer and this meaning applies to the exclusion of the definition of taxpayer in section 6(1), it is clear that an entity which had never derived income or profits or gains of a capital nature could be a taxpayer. For example, an Australian-resident object of a discretionary trust who had been appointed trust income which had not been paid over may not have derived the income, but could nevertheless be subject to tax owing to the operation of ITAA36 s 97. Conversely, many entities would not be 'taxpayers' within the ordinary meaning of the term merely by virtue of the fact that they have never paid any tax owing to the application of accumulated tax losses, for example. Thus, as is the case if the s 6(1) definition is adopted, it is possible that some entities could engage in arrangements in

order to escape the operation of Part IVA as a result of the fact that they are not a 'taxpayer'.

5.1.3 Concurrent operation of the two definitions?

The two definitions of 'taxpayer' therefore describe overlapping categories of entity, but do not describe all entities which perhaps should be subject to Part IVA. In determining whether the definition of 'taxpayer' in subsection 177A(1) was intended to create an exclusive definition of the term for the purposes of Part IVA, the operation of s 177B(1) is important.

Section 177B(1) states that, subject to a proviso which is not relevant here, 'nothing in the provisions of this Act other than this Part or in the *International Tax Agreements Act 1953* or in the *Petroleum (Timor Sea Treaty) Act 2003* shall be taken to limit the operation of this Part.' Assuming that the definition of 'taxpayer' in s 177A(1) was intended to adopt the ordinary meaning of 'taxpayer', it is unclear whether s 177B supports the conclusion that the definition of 'taxpayer' in subsection 177A(1) excludes the definition expressed in ITAA36 s 6(1). Alternatively, does section 177B mean that the two definitions are to be read concurrently, but on the basis that the ordinary meaning of the s 177A(1) definition is allowed the broadest ambit? The latter view would allow the broadest scope to Part IVA because entities deriving income etc and/or entities paying tax or being liable to pay tax would all fall within the concept of 'taxpayer' for the purposes of Part IVA.

Thus, if an entity has derived income but has not paid tax, it will be a 'taxpayer' under the s 6(1) definition but not under the section 177A(1) definition. Conversely, if an entity has not derived income but it has paid taxes, the limitation imposed under the s 6(1) definition will be negated by s 177B(1) and the s 177A(1) definition will remain operative.

Where an entity has neither derived income or profits or gains of a capital nature nor paid tax or been liable to pay tax, then neither definition will apply and Part IVA could not apply. It is counterintuitive that a taxpayer might avoid the operation of Part IVA by engaging in a Part IVA/tax avoidance arrangement which ensures that they neither derive income nor become liable to (presumably) income taxation. However, in *Peabody* the High Court's acceptance of the taxpayer's associate's decision to engage in one form of tax avoidance (redeemable preference share financing) resulted in the High Court concluding that Part IVA could not apply in the circumstances of the case – one tax avoidance arrangement negated the finding of tax

avoidance with respect to the broader arrangement.[110] Clearly there is a need to reframe the definition of 'taxpayer' for the purposes of Pt IVA. In particular, the references to 'taxpayer' could be replaced with the second person 'you' used in the ITAA97, or by referring to 'any entity' with an appropriately broad definition of 'entity'.[111]

6. Conclusion

The foregoing discussion illustrates the poverty of mainstream Australian theory with regards to statutory interpretation. Neither literalist nor purposive interpretive theories offer a convincing account of the Grollo decision. That decision suggests that judges do exercise a broad interpretive discretion, whether or not they acknowledge the existence of such a discretion. Indeed, it is possible that all members of the Full Federal Court presiding in the Grollo litigation believed that they were in truth discovering the law which was 'there'. However, the preceding consideration of the rhetorical devices embedded within the Grollo judgment indicates that a third interpretive theory, law as rhetoric, is descriptively appealing. If indeed judges do make up the law as they go without necessarily knowing that they are doing so, both the determinacy thesis and the rule of law are, truly, a myth.[112] This conclusion poses challenging questions regarding the reconstruction of the law and legal institutions within a postmodern paradigm which are beyond the scope of this paper. For example, the adjudicative function of the courts must be reconceived to take account of legal indeterminacy.[113]

Aside from the illustrative nature of the Grollo decision in elaborating a theory of law as rhetoric, that decision points to a critical shortcoming of Part IVA. Whichever interpretation of the definition of 'taxpayer' in section 177A(1) is adopted, it is clear that that definition is flawed because it seems to allow some entities to elude the ambit of Part IVA. The terminology of 'taxpayer' should therefore be replaced with more general terminology, such as the second person 'you' applied in the Income Tax Assessment Act 1997. Although a theory of law as rhetoric suggests that the concept 'you' does not have determinate meaning, by applying this concept to the domain of Part IVA the legislature would resolve the problems arising from the concept of 'taxpayer' and, hopefully, constraining the rhetorical discourses which might be applied in the interpretation of the new term.

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110 94 ATC 4663, 4671.

111 ITAA 1997 s 960-100.

112 Fitzpatrick, above n 9.

113 In this regard see, for example, Dabner, above n 64.