

to the relationship between the Government and the administration, it will only be doing harm to the job.

tax reform

There has been a remarkable recognition by the community of the evil of tax evasion. It was not always so. Not very long ago, the tax evader was perceived to be a kind of Robin Hood who it would be almost churlish — and certainly unporting — to pursue.

Mr Justice F.G. Brennan, *'Evil and the Law'*, August 1982

sherwood forest. Mr Justice Brennan's observation for an international conference on 'Evil and the Law' indicate just how great has been the change in attitudes to tax evasion in the highest quarters in the Australian legal scene. Speaking in the wider context of morality and the law, the Judge suggested a reason why the change had come about:

Perhaps it was the realisation that the Sherwood Forest of tax evasion was overpopulated which led to the now widespread condemnation of the practice. The enforcement of the law in this area of financial activity has been facilitated by the development of a general recognition of the evil of tax evasion.

Evasion and Avoidance. On those two little words hung, in the past, many a philosophical, even theological debate. A signal of the change occurred in March 1982 when the High Court of Australia overturned a 1970 Privy Council decision on the interpretation of the capital gains provisions of the Income Tax Assessment Act in the *Whitford's Beach* case. The decision indicated that the courts could look behind the 'corporate veil' of a business to determine whether the profits from a particular venture were assessable for tax purposes.

bottom of the harbour. Then in August 1982 came the report of the Costigan Royal Commission criticising the Australian Tax Office, a Deputy Crown Solicitor's Officer and the Attorney-General's Department for failure to vigorously attack so called 'bottom-of-the-harbour' tax evasion schemes. In the midst of a furious political outcry which followed the publication of the Costigan Reports, a number of steps were taken:

- A special prosecutor, Mr Roger Gyles QC, was appointed to investigate the colourfully termed 'bottom-of-the-harbour' schemes. Mr Gyles, a member of the Administrative Review Council, met members of the Federal Task Force and undertook to conduct prosecutions 'with as much expedition as possible'. He declared that there were a lot of people involved and he had a two year term to sort things out.
- Federal Treasurer John Howard on 13 September 1982 criticised the Taxation Office for withholding several legal opinions recommending prosecutions of 'bottom-of-the-harbour' tax avoidance promoters.
- Most controversial of all, the Prime Minister, Mr Fraser, and the Federal Treasurer announced the Government's intention to legislate retrospectively against 'bottom-of-the-harbour' tax schemes. This decision has produced condemnation in quarters normally supportive of the Government. The Prime Minister has, however, stuck to his guns. Canvassing support in a number of State branches of the Liberal Party, he insisted that, although retrospectivity of legislation was generally undesirable, there was a principle of fairness at stake: fairness to ordinary Australian taxpayers to be defended against those who had wrongfully benefited from the evasion of tax liability. In October, Mr Fraser acknowledged that the divisions caused by the decision amounted to the most serious threat to the Liberal Party since its establishment nearly 40 years before.

Generally speaking, the Prime Minister's action secured editorial support. The *Age* (28 September 1982) expressed the view:

While retrospectivity is repugnant, so is the use of artificial legal devices to enable wealthy people to avoid paying their rightful taxes. It is immoral that a company that owes taxes on its profits should be sold through a tax dealer to people with no assets, at a price that assumes no taxes will be paid, and with its own assets stripped from it on the way. A number of eminent lawyers have advised the Government that

- Disciplinary proceedings were brought against certain Commonwealth officers.

these transactions were illegal in any case, and that those involved could be prosecuted. Had the High Court not twisted the clear meaning of the original anti-tax avoidance section of the Income Tax Assessment Act beyond recognition, this argument would be beyond doubt. The bottom-of-the-harbour schemes were certainly immoral, possibly illegal, and to date have cost the Government a vast amount of revenue. In these circumstances the Government's decision to require the beneficiaries of the schemes to pay the taxes owing — without penalties, and without criminal charges — represents a fair compromise between the two important principles.

According to the N.S.W. Attorney-General, Mr Frank Walker QC, the investigation of bottom-of-the-harbour companies in New South Wales alone could take ten years and involve tens of millions of dollars. He asserted that the schemes were 'just the tip of the iceberg — just an extreme end of the tax evasion racket'. He added that the names of people uncovered by inquiries were 'very recognisable'.

Two prominent Melbourne barristers have gone on the offensive, alleging the recent criticism of tax avoidance was 'McCarthyist'. Mr S.E.K. Hulme QC said on 7 June 1982 that treatment of individuals named in a State report on tax avoidance was similar to the witchhunt by Senator McCarthy in the United States in the 1950s. The Chairman of the Bar Council, Mr Brian Shaw QC said that attacks against lawyers who advise tax avoiders could end by undermining a fundamental pillar of democracy:

People have rights and our system depends on people being able to discover what their rights are and to exercise them. This applies to people in all walks of life — the protestor against the visit of a nuclear-powered submarine, a demonstrator against a Springbok tour, a petty criminal accused of trafficking drugs and members of organisations regarded by the community as criminal when they are accused of criminal offences. It also applies to people interested in tax law. The unpopularity of the last class cannot be allowed to imperil the other classes.

Mr Shaw's comments followed moves by the Bar Council to limit the circumstances in which 'artificial tax avoidance schemes' could be devised and advised by barristers. Meanwhile important developments have been happening in the professions:

- The Law Council of Australia has

suggested the establishment of a special Task Force to combat tax avoidance and evasion. The Council suggested such a force, including lawyers, accountants, investigators and taxation officers as an alternative to the retrospective legislation offered by the Government (*Adelaide Advertiser*, 17 August 1982).

- Australia's largest professional accounting body is devising rules binding on its members who give tax advice or prepare tax returns. The rules will limit involvement by accountants in schemes which significantly understate tax liability.
- The Australian Society of Accountants called in mid July for the Senate Select Committee to study tax reform generally. The Leader of the Opposition in the Senate, Senator John Button was reported as being 'not unsympathetic to the proposal'.

The law, like society, has moods. There is a mood now afoot strongly unfavourable to tax evasion and tax avoidance. The days of the avoiding Robin Hood seem numbered. But will the law and its institutions prove adequate to catch the rebel and recoup his haul?

odds and ends

■ *teachers in court*. The liability of teachers for injury to pupils has been clarified by the decision of the High Court of Australia in the *Commonwealth v. Introvigne* (1982) 41 ALR 577. It was pointed out that a direct duty was owed by the Government for breach of the duty of care — it was not a case of vicarious liability for the omissions of staff. Merely appointing competent teaching staff could not relieve the Crown of its obligations for student safety in government schools. A good new review of *'The Law of Education'* by Ben Boer and Victor Gleeson is published by Butterworths (1982). It looks at children, the law and school from the point of view of the pupils, parents, teachers and educational administration. The wider question of the possible development of the common law to impose duties upon educators beyond 'child-