



Journal of Australian Taxation

(2022) Volume 24

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EDITORIAL

The 2022 issue of the *Journal of Australian Taxation* is contained in Volume 24 and consists of five articles covering a wide range of taxation topics. The year 2022 was still a difficult year with the COVID virus continuing to have an impact on those engaged in researching taxation law. Many academics and practitioners were experiencing lockdown and related fatigue. The Editor is grateful for the contribution made by the authors in this edition of the journal, especially Professor Freudenberg for his ongoing support of this journal. Dr John Minas from Curtin University has accepted a role as joint editor of the journal, and he will be active in promoting the journal and encouraging tax academics to contribute in 2023 and beyond.

The article is written by Alexander Fullarton and Dale Pinto contend that the Australian Taxation Office (ATO) practice of issuing opinions and taxation rulings for the guidance of taxation practitioners compiling and submitting taxation returns does not always result in greater clarity or certainty in the application of taxation laws. To illustrate that argument the paper addresses the example wherein the ATO considers all animals used in a business of primary production as trading stock. Their view is based on their interpretation of the findings in the appeal case of *Federal Commissioner of Taxation v Wade*. The paper is based on the Wade case which shows that the issue of how livestock should be treated for taxation purposes may in fact be wrong. Some agricultural animals may in fact be capital such as breeding stock and that they should not be treated as trading stock and on the revenue account. It should be noted that the authors when referring to the Live Stock Schedules in accounting form, as presented in Wade's income tax return, used the words as they are referenced, that is 'Live Stock' Schedule. Two words. At other times 'livestock' is one word.

John McLaren and John Minas

Editors 2022

THE FOUNDATIONS OF THE WADE CASE: CONCRETE OR CLAY?

ALEXANDER FULLARTON* and DALE PINTO[‡]

Abstract

This paper argues that the Australian Taxation Office (ATO) practice of issuing opinions and taxation rulings for the guidance of taxation practitioners compiling and submitting taxation returns does not always result in greater clarity or certainty in the application of taxation laws. To illustrate that argument the paper addresses the example wherein the ATO considers all animals used in a business of primary production as trading stock. However, the word all is not contained in s 995 of the Income Tax Assessment Act 1997 (Cth) (ITAA 1997); but rather, the ATO view is based on its interpretation of the findings in the appeal case of Federal Commissioner of Taxation v Wade ('Wade Case').

However, it has been previously argued that dairy cattle, and stud stock held for breeding purposes, should be treated as capital assets and not trading stock. Those publications examined the Wade Case but contained a number of assumptions made due to a lack of substantiable evidence. Subsequent investigation of the High Court appeal books and other documentary evidence focussing on initial Commonwealth Taxation Board of Review decision that preceded the Commissioner of Taxation's appeal to the High Court is examined in this paper. The paper analyses those documents and investigates background not reported in Court authorised publications. It compares them with previous publications to reveal a deeper insight of the case and addresses the assumptions made in those publications. It argues that the Wade Case focussed on the assessable nature of monies received as compensation for loss of assets. That Wade's loss was dairy cattle is somewhat irrelevant to the findings of the case. The paper finds that, prior to 1936, animals used as breeding stock were of capital nature for taxation purposes. However, the legislation was repealed in 1936 which rendered all animals used in a business of primary production to be classified as trading stock. Therefore, it concludes that while ATO view is correct, the basis supporting the view is not.

I INTRODUCTION

This paper argues that the Australian Taxation Office (ATO) practice of issuing opinions and taxation rulings for the guidance of taxation practitioners compiling and submitting taxation returns does not always result in greater clarity or certainty in the application of taxation laws. To illustrate that argument the paper addresses the example wherein the ATO considers all animals used in a business of primary production as trading stock. However, the word all is

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not contained in s 995 of the Income Tax Assessment Act 1997 (Cth) (ITAA 1997); but rather, the ATO view is based on its interpretation of the findings in the appeal case of *Federal Commissioner of Taxation v Wade* ('Wade Case').¹

However, it has been previously argued that dairy cattle, and stud stock held for breeding purposes, should be treated as capital assets and not trading stock.² Those publications examined the Wade Case but contained a number of assumptions made due to a lack of substantiable evidence. Subsequent investigation of the High Court appeal books and other documentary evidence focussing on initial Commonwealth Taxation Board of Review decision that preceded the Commissioner of Taxation's appeal to the High Court is examined in this paper. The paper analyses those documents and investigates background not reported in Court authorised publications. It compares them with previous publications to reveal a deeper insight of the case and addresses the assumptions made in those publications. It argues that the Wade Case focussed on the assessable nature of monies received as compensation for loss of assets. That Wade's loss was dairy cattle is somewhat irrelevant to the findings of the case. The paper finds that, prior to 1936, animals used as breeding stock were of capital nature for taxation purposes. However, the legislation was repealed in 1936 which rendered all animals used in a business of primary production to be classified as trading stock. Therefore, it concludes that while ATO view is correct, the basis supporting the view is not.

Broadly, this paper argues that rulings, determinations and advice provided by the Australian Taxation Office (ATO) should not be considered by tax practitioners as always providing for greater clarity and certainty in the preparation and lodgement of taxation returns and the payment of tax. The practice of accepting the ATO opinion unchallenged can have extremely significant fiscal impacts on taxpayers and tax collections. To illustrate that impact this paper uses a hypothetical case study provided by Fullarton and Pinto³ as to the sale of a pastoral lease by the executor of a deceased estate.

That hypothetical case study reveals that the discrepancy of tax payable by considering the cattle remaining on a pastoral lease for breeding purposes as capital assets rather than livestock for sale is considerable. Animals left on the pastoral lease by the Executor for the purpose of maintaining a breeding herd at an estimated value of AUD 300 000 attracted an income tax liability of around AUD 50 000. However, by considering breeding or stud animals as capital assets then after capital gains tax concessions the tax liability is reduced to nil. This paper suggests that for want of thorough research and challenge of 'accepted' principles, taxpayers have over paid a significant sum of taxes to the ATO as income has been wrongly assessed.

However, it must be noted that the ATO may not be directly responsible for the anomaly. While it has provided guidance on its view, the ATO clearly states the caveat that its opinion may be not be correct and its written opinions include a specific disclaimer which states:

If this advice turns out to be incorrect and you underpay your tax as a result, you will not have to pay a penalty. Nor will you have to pay interest on the underpayment provided

¹ (1951) 84 CLR 105.

² Alexander Fullarton and Dale Pinto, 'Tax Accounting for Livestock: Mother or Meat/Capital or Revenue' (2021) 27(1) *New Zealand Journal of Taxation Law and Policy* 39; and Alexander Fullarton and Dale Pinto 'The Wade Case: An Analysis' (2021) 27(2) *New Zealand Journal of Taxation Law and Policy* 121.

³ Fullarton and Pinto, 'Tax Accounting for Livestock: Mother or Meat/Capital or Revenue' (2021a) 27(1) *New Zealand Journal of Taxation Law and Policy* 39, 47.

you reasonably relied on the advice in good faith. However, even if you don't have to pay a penalty or interest, you will have to pay the correct amount of tax.⁴

Tax agents are duty bound to take reasonable care to ensure that taxation laws are applied correctly to the circumstances in relation to which they are providing advice to a client⁵ and in that context the paper asserts that agents should not simply accept the ATO view on a matter as necessarily representing the correct view of an issue.

In their article Fullarton and Pinto noted that, despite the ATO's caveat that its advice could be incorrect, a majority of accountants and tax practitioners and other professionals involved in the sale of pastoral leases

... considered that in order to be in compliance with the tax accounting requirements, establishing the distinction between livestock as breeding stock and those as trading stock should be carried out, but ultimately, it is too hard; hence, the livestock trading account (revenue) option is adopted. That is despite most of them being aware of the CGT concessions.⁶

They suggest that tax practitioners should use such ATO rulings and determinations as a guide and not rigid matters of Law. Each case should be considered on its merits and assessed accordingly. However, in the example addressed in this paper, being the use of the *Wade Case* as concrete evidence to determine a particular class of asset, it appears many hundreds of taxpayers may have paid many millions of dollars in tax over a period of over 70 years, as the opinion of the ATO has been accepted without challenge.

This paper examines the view held by the ATO that all animals held in a business of primary production, are trading stock for the purposes of sale, regardless of their actual purpose or function in that business. That view appears counter intuitive to people with a rural background or familiarity with farming. It might appear nonsensical to consider the horses and dogs used to muster sheep and cattle form part of the trading stock of a farm which produces animal products such as wool or milk. One does not normally shear or milk horses and dogs, but rather the ATO view considers them as trading stock – a revenue asset, rather than aids manufacture or plant – a capital asset.

A broad examination of the ATO view is contained in previous publications. The previous papers challenged the ATO view and argued that stud stock or animals used for breeding or other purposes are not trading stock but rather should be considered as capital assets used for the purposes of manufacture.⁷ Those publications argued that the word all is not contained in s 995 of the *Income Tax Assessment Act 1997* (ITAA 1997), but found that the ATO view relies entirely on the findings of the *Wade Case*⁸ for support.⁹ However, no taxation ruling, determination or other public notice was found to express that view other than an Interpretative

⁴ Letter from Alison Lendon, Deputy Commissioner of Taxation, to Alexander Fullarton, 6 November 2019. (Appendix A).

⁵ Code of Professional Conduct *Tax Agent Services Act 2009* (Cth) s 30-10.

⁶ Fullarton and Pinto (n 1) 68.

⁷ Ibid 67.

⁸ (1951) 84 CLR 105.

⁹ Fullarton and Pinto (n 2).

Decision,¹⁰ which focuses on considering animal embryos not to be livestock, therefore ATO advice was sought to confirm that view. The advice received¹¹ acknowledged the taxation legislation does not contain the word all in its definitions of livestock and confirmed that ATO view and that the Commissioner of Taxation relies on the findings of the Wade Case to substantiate the view ‘that the definition of livestock in section 995-1 of the ITAA 1997 includes all animals in a primary production business’.¹²

Given the Commissioner’s view relies entirely on the Wade Case, which has had a significant impact on the amount of tax paid by Australian primary producers over the past 70 years, an examination of the Wade Case was conducted to investigate and evaluate the reliability of those findings to support his opinion. Fullarton and Pinto¹³ found that sufficient doubt existed to suggest the Commissioner’s view might not be reliably supported by the findings of the Wade Case. They further supported the argument that some animals held in a business used for primary production, such as horses and dogs used for mustering and stud stock used for breeding, or the production of animal products, such as milk or wool, are of a capital nature and should be treated accordingly for taxation purposes.

They examined the distinction between classifying the expenditures of an enterprise as capital (assets purchased) or revenue (costs of operation) and in particular, they looked at the taxation implications of accounting for livestock as trading stock purchased, or bred, for sale and those animals purchased, or bred, for breeding purposes.

They argued:

... that animals kept for breeding purposes are capital assets, and therefore the proceeds of the sale of those animals, in conjunction with the sale of the property and other assets contained thereon for the purpose of operating the business, are capital sales. Thus, that proportion of the proceeds of the sale of the primary production business should be subject to the [capital gains tax] (CGT) provisions [of the ITAA 1997] and taxed accordingly.¹⁴

It is also noted that the advice received from the ATO also contained reference to the ATO Interpretative Decision ID 2003/726. It is significant that that ID 2003/726, also recognises that the word all is not contained within s 995 of the ITAA 1997 but refers to the ‘inference’ held in the findings of the Wade Case that all animals that are used in primary production are included in the definition of livestock.

In particular it refers to part of the decision which states:

Rather than outlining what is considered to be livestock this definition merely states which animals are not considered to be livestock. However, in *Federal Commissioner of Taxation v. Wade* (1951) 84 CLR 105; (1951) 9 ATD 337; (1951) 5 AITR 214 (*Wade's Case*), the High Court considered that this definition infers that all animals that are used in primary production are included in the definition of livestock. Per Dixon and Fullagar JJ: There is

¹⁰ Australian Taxation Office, *Income Tax: Definition of Livestock and Animal Embryos* (ID 2003/726, 30 July 2003).

¹¹ Lendon (n 4).

¹² Ibid.

¹³ Alexander Robert Fullarton and Dale Anthony Mark Pinto, ‘The *Wade Case*: An Analysis’ (2021b) 27(2) *New Zealand Journal of Taxation Law and Policy* 121.

¹⁴ Fullarton and Pinto (n 2) 68.

a definition of livestock which, by inference, makes it clear that all animals are to be included in the case of a business of primary production.¹⁵

Therefore, this paper also considers the ATO advice that the statement in the findings of the Wade Case that the definition of livestock ‘by inference, makes it clear that all animals are to be included in the case of a business of primary production’¹⁶ is sufficient substantiation to hold the opinion that NO animals held in a business of primary production can be considered as capital assets used for the purposes of producing saleable goods, but rather all animals used in a business of primary production are saleable goods, that is trading stock.

In 1950 Michael Wade appealed to the Commonwealth Taxation Board of Review (CTBR) to set aside an amendment made by the Commissioner of Taxation to his 1948 income tax return. The matter found in favour of the taxpayer and was subsequently appealed in the Australian High Court by the Commissioner of Taxation in 1951.¹⁷ The full bench of the Australian High Court the Commissioner’s appeal was allowed, and the decision of the Board of Review set aside.

This paper looks beyond the findings of the full bench of the High Court and conducts further research into the background of the Wade Case by way of examining the initial decision of the Wade’s earlier appeal to the CTBR¹⁸ and the Commissioner’s initial appeal to the High Court.¹⁹

Therefore, in order to fill the gaps in the previous research and to support, or refute, the findings of the previous publications, this paper examines evidence presented to the CTBR for background to the *Wade v Commissioner of Taxation*²⁰ decision. It also examines commentary of other reports of the CTBR matter such as Butterworth’s Commonwealth Taxation Board of Review Decisions;²¹ and Walters Kulwer’s CCH Taxation Board of Review Decisions.²²

The following section re-examines the *Wade Case* in detail with further evidence produced to the High Court arising from the CTBR matter of *Wade v Commissioner of Taxation* and the first appeal by the Commissioner to the High Court.²³ It also re-examines the previous publications to address the gaps in the earlier analyses.

II THE WADE CASE REVISITED

A Background

¹⁵ Lendon (n 4).

¹⁶ Ibid.

¹⁷ *Wade Case* (n 5).

¹⁸ *Wade v Commissioner of Taxation*, Commonwealth Taxation Board of Review No. 2. (1950) No M37/1950. Note: The matter is also reported as (1950) 1 CTBR (NS) Case 77, 335; and (1950) 1TBRD Case 72, 273.

¹⁹ *Commissioner of Taxation v Wade* (High Court of Australia, Kitto J. 4 September). It is noted that the matter was initially heard by Kitto J alone on 4 September 1951. A decision was not made at that time but rather it was ordered the case to be argued before a Full Court of the High Court.

²⁰ *Wade v Commissioner of Taxation* (n 15).

²¹ John Angus Lancaster Gunn and Richard Esmond O’Neill (eds), *Commonwealth Taxation Board of Review Decisions (New Series)* (Butterworth and Co, 1952) 1; (1 CTBR (NS)).

²² Wolters Kulwer, CCH Australia *CCH iKnow* (online at 2 April 2022) < [FEDERAL COMMISSIONER OF TAXATION v. WADE - CCH iKnow | Australian Tax & Accounting](#)>.

²³ *Commissioner of Taxation v Wade* (n 16).

The previous analysis of the findings of the Wade Case provided the following overview of the case and the details known at that time:

In 1951, Michael Wade was a dairy farmer carrying on business in the suburb of Osborne Park in the City of Perth, Western Australia. In the financial year 1947–48, 110 of his dairy cows were destroyed under the provisions of the *Milk Act* 1946–1947 (WA). Wade received a sum of A£2,016 (A\$4,032) as compensation for the animals that were destroyed. In the same year, he purchased 116 replacement dairy cattle for the sum of A£1,986 (A\$3,972).

In his return of income for the year of income in which this took place [1948] he treated the extra six dairy cattle as a purchase of stock and showed the amount in his livestock account; but he excluded from his revenue account the receipt of £2,016 compensation for the 110 cattle condemned. Correspondingly he excluded the cost of the 110 cattle by which he replaced them, an amount of £1,886, placing a note on his return that this was a purely capital transaction.²⁴

The following sequence of events has been compiled from documents contained in the Appeal Book provided to the judges in the Wade Case. The documents contain not only a timeline of the events leading to the Commissioner of Taxation’s appeal to the full court of the High Court of Australia but also provide an insight into the facts and points of Law considered by their Honours, but not written into the reported findings of the case.²⁵

B *Timeline of events*

13 May 1949 - Michael Wade lodged his return of income for the financial year ended 30 June 1948. Of significance to this matter is that he excluded the financial transactions relating to the destruction and replacement of 110 cattle held in his primary production business. However, a note was included in his tax return disclosing the event but stating that the transactions were not disclosed as income as they were of a capital nature and did not form part of Wade’s assessable income.²⁶

26 August 1949 - The Commissioner of Taxation issued his assessment of taxation to Wade based on his income tax return, but adjusted to include the transactions relating to the disposal and replacement of the 110 cattle.²⁷

13 September 1949 - Wade objected to the assessment on three grounds –

- (1) ‘Cattle condemned and replaced from the compensation paid should not enter the trading stock of cows at all.’
- (2) Milk consumed assessed at the value of £26 was excessive. And
- (3) The reduction of ‘Amount expended on food for employees’ from £1 per head per week to 15/- was wrong. The original sum of £1 per head per week should be used.²⁸

²⁴ *Wade*, 108–9; Fullarton and Pinto, (n 1) 124.

²⁵ The High Court of Australia authorises its findings to be published in the Commonwealth Law Reports 1903- (CLR) by Westlaw Australia and the Australasian Legal Information Institute; and Gunn and O’Neill (n18).

²⁶ *Commissioner of Taxation v Wade* Appeal Book High Court of Australia, 9 of 1950, 18.

²⁷ *Ibid* 14.

²⁸ *Ibid* 24-6. Note the symbols £ and /- are for Australian Pounds Sterling and Shillings. Prior to 14 February 1966 Australia used the British Sterling system of currency in which a pound consisted of 20 shillings.

18 October 1949 - The Deputy Commissioner of Taxation for Western Australia notified Wade that his objection was disallowed and that he may refer the matter to a Board of Review, or to appeal to the High Court or to the Supreme Court of a State. The notice further advised Wade of the requirement of the payment of a fee of £1 to accompany a request to a tribunal.²⁹

14 November 1949 - Wade advised the Deputy Commissioner of Taxation (WA) of his request to have the matter referred to the Board of Review, together with his payment of the £1 prescribed fee.³⁰

19 May 1950 - The Second Commissioner of Taxation referred Wade's request for a decision on the objection to his assessment to the Taxation Board of Review No. 2 in Melbourne.³¹

The request was accompanied by a statement that the Commissioner's reasons for disallowing the taxpayer's claims were –

1. That the taxpayer disposed of part of assets of his business being trading stock and the amount of £2 016 is, pursuant to section 36(1) of the Income Tax Assessment Act 1936-1948, assessable income; alternatively, the amount of £2,016 was received as or by way of insurance or indemnity and is assessable income under the provisions of section 26(j) of that Act.
2. That the value of produce taken from the business and used for the maintenance of the taxpayer and his employees was not less than £26.
3. That the expenditure incurred by the taxpayer in providing food for his employees was not greater than £270.³²

That statement is not helpful unless Wade's income tax return and assessment are considered to provide the points of discrepancy.

1. Wade had not included the £2016 compensation payment in his income tax return, but rather appended a note:

110	Cattle condemned by Stock Department.	
	Received Compensation.	2016
110	Cattle replacement cost	1886
	Purely a Capital transaction.	

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2. Drawings of goods for own use cannot be located on the income tax return³⁴ it is assumed that nil was declared and the Commissioner adjusted the assessment by the entire £26; and
3. Wade claimed £1 per week per employee for food being a total of £360. The Commissioner adjusted that expenditure to 15/- per week per employee to £270.

²⁹ Ibid 27-8.

³⁰ Ibid 29.

³¹ Ibid 30.

³² Ibid 31-2.

³³ Note appears to have been glued to page 3 of the income tax return 'LIVE STOCK SCHEDULE. Ibid 18.

³⁴ Ibid 16-20.

In total, the Commissioner had increased Wade's assessable income by £2589 from £5025 to £7614.³⁵ The Commissioner had also increased Wade's allowable deductions by £1780 from £3886 to £5666. The result was a net increase in taxable income from £1140 to £1948.³⁶

It is noted that in Australia, in 1948, £808 was a considerable sum of money to a small dairy farmer on the outskirts of Perth in Western Australia, especially to one who had just suffered the misfortune of having his entire dairy herd slaughtered as a quarantine measure to prevent the spread of tuberculosis. By comparison, the average male income was just £7/17/6 (\$15.75) or £409/10 (\$819).³⁷ In modern times the argument over the adjustment to Wade's assessable income may appear paltry, but in 1948, it was significant.

12 September 1950 - Wade's evidence was put to the Taxation Board of Review under examination by W E Southwood (representing Wade) and cross-examined by Edward Thomas C Cain (Representing the Commissioner). A transcript of proceedings is included in the Appeal Book provided to their Honours in the subsequent appeal to the Full Bench of the High Court.³⁸

The outcome was that Wade withdrew two of the three claims disallowed by the Commissioner namely numbers two and three relating to goods drawn for own use and the value of employee meals. The first, and remaining, claim, that of the compensation and replacement of dairy cattle, to be excluded from the taxpayer (Wade's) assessable income, save for the £130 difference between the compensation paid (£2016) and the cost of replacement of 110 cattle (£1886). The remainder, the £454 (the value of closing stock), to be considered as assessable income.³⁹

8 December 1950 - The Commissioner of Taxation lodged a notice of appeal to the High Court to resolve the following questions of law:

1. Whether the condemnation and killing of the said cattle and the receipt of £2,016 as compensation was a disposal of trading stock within the meaning of section 36 of the Income Tax Assessment Act 1936-1948;
2. Whether the said sum of £2,016 was an amount received by the Respondent by way of insurance or indemnity for or in respect of any loss of trading stock which would have been taken into account in computing assessable income within the meaning of section 26(j) of the Income Tax Assessment Act 1936-1948; and
3. Whether the Board of Review was right in holding that it was not open to it to find that the said amount of £2,016 could have been included under section 26(j) of the Income Tax Assessment Act 1936-1948.⁴⁰

³⁵ Ibid 22.

³⁶ To further complicate the analysis Wade had also declared £1 of property income.

³⁷ ABS Cat 6350.0

³⁸ *Commissioner of Taxation v Wade* (n 23) 33-8.

³⁹ Ibid 39-61.

⁴⁰ Ibid 14. It is noted that the Commissioner of Taxation might have appealed to the Western Australian Supreme Court in the order of the hierarchy of courts. Since 1977 the matter might have been appealed to the Federal Court, as it refers to Commonwealth Legislation, however it was not, it was referred initially to a single judge of the High Court and the decision to refer the matter to the Full Bench was made by Kitto J.

4 September 1951 - The Commissioner of Taxation appealed to the High Court before a single judge, Kitto J, to lodge and appeal to the Full Bench of the High Court.⁴¹ Evidence was presented by N A Lappin for the Commissioner, with Edward Thomas C Cain as witness for the appellant. The order was ‘that this case be argued before a Full Court at the present sittings of the Court in Perth’⁴² and that ‘the transcript of these notes will be available for the members of the Full Court.’⁴³

10 September 1951 - The Commissioner’s appeal was referred by Kitto J in Perth Western Australia to the Full Bench of the High Court.⁴⁴

5 November 1951 - The Commissioner’s appeal was heard in Melbourne by the Full Bench of the High Court.⁴⁵ It is noted that the Full Bench included Kitto J who had heard the initial appeal and had the benefit of hearing Wade and the Commissioner’s evidence in the Court.⁴⁶

It is also noted that N A Lappin appeared for the Commissioner of Taxation but there was no appearance of Counsel for the respondent. Dixon and Fullagar JJ noted ‘There was no appearance upon the appeal for the respondent taxpayer’⁴⁷ and assumed the taxpayer ‘doubtless regarded the amount of the consequential reduction of tax as insubstantial’.

However, the transcript of the proceedings before Kitto J on 4 September contains a discussion as to why neither Michael Wade nor his solicitors would not be attending the appeal hearing and an undertaking by N A Lappin ‘to see that a copy of [the] notes will be available for the members of the Full Court.’⁴⁸ The transcript also contains a confirmation to an undertaking that the Commissioner would not for an order for costs against [the taxpayer].⁴⁹

No transcript of the hearing before the Full Bench has been found in this research and the findings of that matter rely entirely on the publication found in the Commonwealth Law Reports. However, this paper considers the background of evidence put in the *Wade Case* therefore a verbatim record of proceedings might be considered beyond the scope of this research, but would have been examined if available. The observation as to representation and costs above, is not intended to imply a negative assessment of their Honour’s observations, which are obiter dictum or simply an expression of their opinion, but rather to illustrate details which may have been overlooked in the reported findings.

A central tenet of this paper is that reliance on the findings published in the Commonwealth Law Report, while accepted as supporting evidence for an argument before the court, may not be sufficient to provide a concrete base for all similar matters, as the ATO advice may imply. It is also note that the ATO advice contains a disclaimer to the effect that the advice could subsequently be proven incorrect. The small matter outlined above supports the argument of

⁴¹ Ibid 2-9.

⁴² Ibid 9.

⁴³ Ibid.

⁴⁴ Judges Dixon, Fullagar and Kitto.

⁴⁵ *Wade Case* (n 5).

⁴⁶ Transcript of Proceedings Before his Honour Mr Justice Kitto 4 September 1951 *Commissioner of Taxation v Wade* (n 22) 2-9.

⁴⁷ *Wade Case* (n 5) 338.

⁴⁸ *Commissioner of Taxation v Wade* (n 23) 9.

⁴⁹ Ibid 7.

this paper. Wade did not appear, nor did his counsel, as it was previously undertaken by the Crown Solicitor that Wade's evidence would be put to the Full Bench and costs would not be sought by the Commissioner against Wade. He had no need to journey to Melbourne to give the same evidence that he had given in Perth before Kitto J. Kitto J was aware of that, but it appears the other judges were not.

C Taxation Review Board Evidence Applied

Fullarton and Pinto previously examined the High Court's findings of the Wade Case⁵⁰ however those examinations were limited in that they relied on the reported findings of the High Court⁵¹ and a number of assumptions had to be made, such as the actual livestock trading beyond the destruction and replacement of the 110 cattle which were the focus of the case. At that time evidence provided to the Taxation Board of Review was not found.⁵² However, the Appeal Book copies provided to the High Court generally, and to Kitto J specifically, include the decision of the Taxation Board of Review, the statement of reasons supporting that decision and other documents given in evidence by the Commissioner of Taxation and Michael Wade to the Board. Fullarton and Pinto found that Dixon and Fullagar JJ accepted the concept that the cattle were to be considered trading stock, and therefore of a revenue nature, irrespective of the role that they played in the business.⁵³ They also noted that Kitto J was reluctant to accept that principle, but focussed instead on the concept of insurance recoveries and the costs of repairs to support his findings.⁵⁴

Fullarton and Pinto also pointed to a number of relevant previous cases that were not considered by the High Court.⁵⁵ Without supporting documentation other than the report published in the Commonwealth Law Reports it could not be concluded if their Honours were aware of those cases, or if they had been omitted from either the evidence or the findings. The evidence provided by the Appeal Books reveals that those other cases were not put to the High Court for consideration.⁵⁶ Further, the Board heard substantial evidence that Wade had suffered greatly from the loss of his existing herd of cows, and that the replacements were not a 'like-for-like' exchange. He pointed to 'extra labour in bringing them in and getting the quite which was a very hard task and they were not the same class of milkers as I had had on the property for many years.'⁵⁷ None of those 'non-fiscal' considerations can be found in the Commonwealth

⁵⁰ Fullarton and Pinto (n 10).

⁵¹ Wade (n 7).

⁵² It is noted that 'in Australia, there are many other official bodies though [they are] not courts. These bodies are sometimes said to be performing a 'quasi-judicial' function. Decisions of administrative tribunals are sometimes reported in much the same way as court decisions.' (Catriona Cook et al. *Laying Down the Law* (Butterworths 5th ed, 2001) 82. However, cases may not be reported and the record of *Wade v Commissioner of Taxation* Board of Review No. 2. (1950) was discovered in the copy of the Appeal Book – copy of his Honour Mr Justice Kitto (*Wade v Commissioner of Taxation* (n 12)).

⁵³ Fullarton and Pinto (n 10) 130.

⁵⁴ Ibid.

⁵⁵ Ibid 134-7.

⁵⁶ For example: *Robinson v Federal Commissioner of Taxation* [1927] HCA 8; (1927) 39 CLR 297 held that ewe weaners were not trading stock as they were held for the purposes of breeding and that the proceeds of the sale of such ewe weaners were not assessable income. However, it has been found that s 17 of the ITAA 1922, in force at the time, expressly excluded livestock, which in the opinion of the Commissioner, Assistant Commissioner or Deputy Commissioner, are ordinarily used as beasts of burden or as working beasts or for breeding purposes; (Fullarton and Pinto (n 10) 135).

⁵⁷ *Commissioner of Taxation v Wade* (n 15) 34.

Law Report publication as the reports focus the findings and not the evidence presented to the court.

It is also noted that, in Australia, administrative tribunals are not judicial bodies and may function in a less formal manner than the ‘Judicature’. The decisions of Australian tribunals focus on fairness and equity rather than strict application of the Law. However, Courts may set aside the decisions of tribunals for a number of reasons, but not if it is unreasonable to do so.⁵⁸ That discrimination is significant to the background of this case, as what may have been determined as fair by the Board as matters of equity or social inequality, may not have been in accordance with the application of literal approach to legislative interpretation or ‘Black-Letter Law’ as adopted by the High Court in 1951.⁵⁹ Fullarton and Pinto concluded that are a number of changes which have been made in the past 71 years to approaches to legal interpretation which may have significant impact on the outcome of a modern challenge to the findings of the *Wade Case*. They noted:

That the *Wade Case* of 1951 relies substantially on British cases for precedent. In 1951, the British courts were courts of appeal for Australian cases. British court findings have not bound Australian courts since 1986;⁶⁰ therefore, the precedents set by those cases, which bound the High Court in 1951, no longer apply. It is argued that if the *Wade Case* were held in modern times, the outcome may be somewhat different.

Further, since the *Wade Case* of 1951, capital gains tax has been introduced (1985) and the Asprey Report of 1975 indicated that livestock could be considered capital assets rather than trading stock. In addition, the introduction of accounting standards relating to biological assets since 2000 indicate that the ATO view may not be as relevant in 2020 as it was before those events.⁶¹

A significant development in the approach to legislative interpretation is the enactment of s 15AA of the *Acts Interpretation Act 1901* (Cth) which prescribes that:

In interpreting a provision of an Act, the interpretation that would best achieve the purpose or object of the Act (whether or not that purpose or object is expressly stated in the Act) is to be preferred to each other interpretation.⁶²

Therefore, unbound by the restrictions of the use of the literal interpretation that infers all animals are to be included in the case of a business of primary production,⁶³ their honours may have looked at the purpose to which the cattle were put as aids to manufacture. They may have considered that the legislation did not intend to capture animals used as aids to manufacture but rather animals actually used as trading stock for the purposes of making a profit. However detailed investigation of the outcome of the *Wade Case* has been addressed by Fullarton and Pinto⁶⁴ and is beyond the scope of this paper.

⁵⁸ Commonwealth of Australia, Administrative Appeals Tribunal, ‘Tribunals in Australia: Their Roles and Responsibilities’ (Web Page) <<https://www.aat.gov.au/about-the-aat/engagement/speeches-and-papers/the-honourable-justice-garry-downes-am-former-pres/tribunals-in-australia-their-roles-and-responsibilities>>.

⁵⁹ Catriona Cook et al. *Laying Down the Law* (Butterworths 5th ed, 2001) 208.

⁶⁰ *Australia Act* 1986 (Cth).

⁶¹ Fullarton and Pinto (n 10) 138.

⁶² *Acts Interpretation Act 1901* (Cth) s 15AA.

⁶³ *Wade Case* (n 5) 110.

⁶⁴ Fullarton and Pinto (n 10).

The focus of this paper is to examine evidence leading to the appeal to the Full Bench of the High Court of Australia, the final court of appeal used by the Commissioner of Taxation in this matter.⁶⁵ Therefore, this paper moves to examine the decision of the Taxation Review Board and the evidence put to the High Court. It also introduces information not previously considered by Fullarton and Pinto such as Wade's actual livestock trading account filed in his 1948 Income Tax Return and amended by the Commissioner of Taxation.

D Analysis of the Taxation Board of Review documents and Transcript of Proceedings

This analysis compares the research published in the Fullarton and Pinto articles⁶⁶ to the evidence presented to the Taxation Board of Review and the Board's findings, with the transcript of proceedings of the first hearing of the High Court before Kitto J in Perth on 4 September 1951.⁶⁷ In the absence of detailed information Fullarton and Pinto made assumptions as to the accounting treatment of Wade's dairy herd for the fiscal year ended 30 June 1948 and what the livestock trading account may have shown in his 1948 income tax return. They stated that:

The findings detail the circumstances related to the reason the cattle were destroyed and the exact number of cattle involved. They detail the sum of compensation paid for the destroyed cattle and the number and cost of the replacement bought by Wade. However, the findings do not detail the livestock trading account furnished by Wade and amended by the Federal Commissioner of Taxation for the year of income ending 30 June 1948.⁶⁸

However, the Commonwealth Taxation Board of Review (New Series) contains a 'summarised result of the [Commissioner's] alterations as regards [Wade's] cattle'⁶⁹ which is an excerpt of Wade's amended livestock trading account. It is noted that the existence of two authorised court reporting publications may assist researchers in their examination of previous cases and an examination of both reports may be warranted to reveal detail not contained in one or the other.

It is noted here that the preamble presented in the Australasian Tax Decisions⁷⁰ version of the report of the findings of the *Wade Case* contains a detailed reproduction of the Commissioner's calculations to the adjustments of the Live Stock Schedule to arrive at a trading profit of £584, after considering the 'sale' and 'purchase' of the dairy herd and the impact on the averaging value of closing stock. The Commonwealth Law Report version does not. The Commonwealth Law Report version contains the same detail but in word form, rather than set out in an accounting form.

⁶⁵ Australian appeals were abolished by a gradual, and messy, legislative process that began in 1968 and ended with the Australia Acts 1986 <https://www.hcourt.gov.au/assets/publications/speeches/former-justices/gleeson/cj_18jun08.pdf>.

⁶⁶ Fullarton and Pinto (n 1) and Fullarton and Pinto (n 10).

⁶⁷ Transcript of Proceedings, *Commissioner of Taxation v Wade* (High Court of Australia, Kitto J, 4 September 1951).

⁶⁸ Ibid.

⁶⁹ Gunn and O'Neill (n 18) (1950) 1 CTBR (NS) Case 77, 339.

⁷⁰ The *Australian Tax Decisions* (ATD) series contains Australian tax cases from 1930 to 1969. The ATD series was originally published in 15 volumes by the Law Book Company. It was sometimes known as Australasian Tax Decisions.

In this example examination of both publications might have assisted Fullarton and Pinto in their previous article.⁷¹ Detailed discussion of the impacts of the existence of two publications is beyond the scope of this paper but might be considered in future research. Detail of a livestock trading account furnished by Wade in his 1948 income tax return was not found by Fullarton and Pinto. However, it is contained in the copy of Wade’s 1948 Income Tax Return contained in the certified copy of the appeal book⁷² and is reproduced in table 1.

Live Stock Schedule for the year ended 30 June 1948
Table 1: Wade’s 1948 Live Stock Schedule.

Dr				Cr			
Column A				Column B			
Date	Particulars	No.	Amount	Date	Particulars	No.	Amount
1 Jul 47	Opening stock: Cattle Horses	94 9	£ 748 68		Sales: Cattle Horses	24 3	£ 208 8
	Purchases: Cattle Horses	24 6	£ 356 75		Deaths: Horses	3	
	Natural Increase: Cattle	20		30 Jun 48	Closing stock: Cattle Horses	114 10	£ 929 95
		153	£ 1247			153⁷³	£ 1240

The structure of the Live Stock Schedule does not follow modern accounting standards of a Livestock Trading Account however the net loss of £7 is contained in Part D of the 1948 income tax return Income as Farmer, Pastoralist, Horticulturist etc.⁷⁴ The total of Column A is shown at item 43 as income from sales and the total of Column B is shown at item 46 as a deduction from that income. Hence the Live Stock Schedule does not balance with the profit or loss transferred to the Profit and Loss account, as it would in the presentation of a modern set of accounting statements, which was assumed by Fullarton and Pinto.⁷⁵

Table 1 bears little resemblance to the Livestock Trading Account proposed by Fullarton and Pinto shown below in table 2. The discrepancy indicates the danger of making assumptions from part records presented in the authorised law reports of the findings. This paper suggests for a more accurate legal analysis, the evidence submitted to the court and transcripts of the hearings should be consulted as well as the published findings contained in the authorised law reports, as assumptions or inferences drawn from a single source may arrive at misleading or inaccurate conclusions or inferences.

⁷¹ Fullarton and Pinto (n 10).

⁷² Part of Wade’s 1948 Income Tax Return is contained in Kitto J’s appeal book but several pages, including the Live Stock Schedule, are missing.

⁷³ There is a mathematical error in that the total of the column is 154 not 153 as shown. It is noted that there are a number of mathematical errors throughout the income tax return and Commissioner’s amendments. The Court findings noted the errors and adjusted them accordingly. Therefore, they did not influence the ultimate outcome of the case.

⁷⁴ Commonwealth of Australia (n 17).

⁷⁵ Fullarton and Pinto (n 10).

Livestock Trading Account for the year ended 30 June 1948
Table 2: Wade’s Suggested Original Livestock Trading Account.⁷⁶

Dr				Cr			
Date	Particulars	No.	Amount	Date	Particulars	No.	Amount
1 Jul 47	Opening stock	110	£1,562 ⁷⁷	14 Dec 47	Sales	110	£ 550 ⁷⁸
14 Feb 48	Purchases	6	£ 102	30 Jun 48	Closing stock	116	£1,886
30 Jun 48	Natural Increase	110	£ 110 ⁷⁹				
	Gross profit transferred to P&L A/c		£ 662				
		226	£2,436			226	£ 2,436
1 July 48	Opening stock	116	£1,886				

Table 2 is a construction of Wade’s livestock trading account compiled from the data provided in the findings of the *Wade Case*. Sums used reflect the assumed production of calves and the six cattle that he declared as purchases in his original income tax return.⁸⁰ The 110 cattle destroyed and then replaced do not appear in the account in accordance with the findings.⁸¹ It shows a gross profit of £662 rather than a loss of £7. Likewise, the assessed live stock schedule accompanying Wade’s notice of assessment is contained in the documents found in the certified appeal book.⁸² It is reproduced here in table 3, shown below.

Amended Live Stock Schedule for the year ended 30 June 1948
Table 3: Amended Live Stock Schedule.

Dr				Cr			
Column A				Column B			
Date	Particulars	No.	Amount	Date	Particulars	No.	Amount
1 Jul 47	Opening stock:				Sales:		
	Cattle	94	£ 748		Cattle	134	£2,224
	Horses	9	72		Horses	3	8
	Purchases:			30 Jun 48	Closing stock:		
	Cattle	134	£2,242		Cattle	114	£1,383

⁷⁶ Fullarton and Pinto (n 10) 126.

⁷⁷ This amount is interpolated from the sums provided in *Wade*, 109.

⁷⁸ A fictitious figure for illustration purposes. It is assumed that if a fully grown heifer was purchased for £17, then £5 for a weaner would not be unreasonable.

⁷⁹ The nearest valuation of Income Tax regulation 10(3) that could be found was in 1966. The value prescribed at that time was £1. In 1948, it may have been as little as 10/- (shillings: there were 20/- in a £); however, this figure is accepted as sufficient for illustrative purposes. Education Department of Western Australia, *Leaving Accountancy* (Technical Education Publications Trust Fund, Technical Extension Service, 1966) 415.

⁸⁰ *Wade*, 106.

⁸¹ *Ibid*.

⁸² *Commissioner of Taxation v Wade* (n 23) 23.

	Horses	6	75		Cattle Horses	10	98
	Natural Increase: Cattle	20					
		263	£3,137			261⁸³	£ 3,713

The assessment as amended by the Commissioner shows a net profit from livestock trading as £576 in place of the £7 loss as disclosed by Wade in his income tax return. The impact of considering the transactions arising from the destruction of the dairy cattle and their replacement as assessable income rather than a capital transaction had the effect of increasing Wade’s taxable income by £583. It is noted that, due to the nature of living animals, not only are live stock (as trading stock) costs a combination of opening stock levels and purchases the means of acquiring stock, but animals can also breed, go missing and die. Therefore those ‘natural’ changes in population must be valued and brought into account. The Commissioner’s adjustments to bring the ‘capital transactions’ into account as ‘trading transactions’ added the complexity of altering the closing stock value to Wade’s assessable income. Therefore, instead of the closing stock of 114 cattle and 10 horses valued at £1024, they became a value of £1481, thus contributing £457 to the overall increase of £583.

The Appeal Books reveal that the Taxation Board of Review found that the transaction was of a revenue nature and gave its reasons for doing so.⁸⁴ Despite Wade’s argument that the dairy cattle were a capital asset the Board decided that:

Section 6 of the [Income Tax Assessment] Act states that, in the Act, unless the contrary intention appears, “‘trading stock’ includes anything produced, manufactured, acquired or purchased of manufacture, sale or exchange and also includes live stock, and live stock’ does not include animals used as beasts of burden or working beasts in a business other than a business of primary production”.

There can be no doubt that, unless the contrary intention appears, intention somewhere appears, the taxpayer’s livestock i.e. his cattle, must be regarded as trading stock for the purposes of section 28. We can see nothing in section 28, or elsewhere, to suggest any contrary intention with regard to dairy cattle generally, or this taxpayer’s cattle in particular. There is certainly nothing to indicate that the circumstances under which live stock has been acquired are to be enquired into for the purposes of section 28.

‘Live stock’ is ‘trading stock’ for the purposes of the section. If it is on hand at the beginning or end of the year of income, that is enough.⁸⁵

Therefore, the sum of £454, being the value of Wade’s cattle on hand at the end of the 1947-8 fiscal year, was considered as assessable income by the Taxation Board of Review. The Commissioner’s appeal to the High Court was as to the remainder – namely the £130, being the difference between the £2016, received as compensation, and the £1886, the cost of Wade’s cattle. Ultimately, that was the only matter addressed by the High Court.

⁸³ The Commissioner’s assessment has omitted the three horses shown as deaths in Wade’s income tax return.

⁸⁴ *Commissioner of Taxation v Wade* (n 23).

⁸⁵ *Ibid* 52.

In making his assessment for that year of income the Commissioner of Taxation **added** the £2,016 to the amount shown in Wade’s return under sales and the £1,866 to the amount shown under purchases, thus increasing the assessable income derived from the livestock account by the amount of £584.⁸⁶ (emphasis added)

This paper argues that had the matter considered the definition of live stock as trading stock to be its central focus, then the impact on the entire Live Stock Schedule as to the increased value of the closing stock would have been upheld by the court. However, as the Commissioner’s action to the increase in value of Wade’s closing stock had been decided in the Taxation Board of Review, the residual excess of compensation paid to the cost of replacement was the single matter addressed by the High Court.

Fullarton and Pinto found that:

the matter before the court did not consider the number of cattle or their value at the beginning of the year but rather focussed on the sum of £130 being the difference between the compensation paid (£2,016) and the expenditure of £1,886.⁸⁷

Therefore, this paper argues that the focus of the *Wade Case* was the assessability of insurance recoveries and the deductibility of the cost of repairs relating thereto, rather than considering the concept of livestock to be trading stock, as inferred in the ATO advice. The reader is reminded that the ATO notices contain a warning that the advice may be incorrect.⁸⁸ It may appear a little incongruous that the ‘sale’ and ‘purchase’ of livestock was considered by the Taxation Review Board to be valid in assessing the closing value of livestock, yet the actual trades, and profit arising, were not. Ultimately it was that single fact, the £130 profit arising from the discrepancy between the compensation monies paid to Wade and the cost of the replacement cattle, that was considered by the High Court.

Fullarton and Pinto noted that earlier cases focussing on the sale of livestock in Australia had found that breeding stock were not trading stock.⁸⁹ The following section investigates why the *Wade Case* might have been appealed to the High Court if the matter had already been resolved.

E Previous Litigation presented in the Wade Case

Fullarton and Pinto outlined the cases presented to the High Court in the findings of the Wade Case namely:

Commissioners of Inland Revenue v Brooks;⁹⁰ *Commissioners of Inland Revenue v Newcastle Breweries Ltd*;⁹¹ *Commissioners of Inland Revenue v Northfleet Coal & Ballast Co*;⁹² *Commissioners of Inland Revenue v Executors of Williams*;⁹³ *Danmark Pty Ltd v Federal*

⁸⁶ *Wade*, 106.

⁸⁷ Fullarton and Pinto (n 1) 125.

⁸⁸ Lendon (n 2).

⁸⁹ Fullarton and Pinto (n 10) 135.

⁹⁰ (1915) AC 478.

⁹¹ (1927) 12 TC 927. Reported in K.BD, 42 TLR. 185, CA., 42 TLR. 609, and H.L., *43 TLR. 476.

⁹² (1927) 12 TC 1102.

⁹³ (1943) 1 All E.R. 318.

Commissioner of Taxation;⁹⁴ *Farnsworth v Federal Commissioner of Taxation*;⁹⁵ *The Commissioners of Inland Revenue v J Gliksten & Son, Ltd*;⁹⁶ *Maritime Electric Co Ltd v General Dairies Ltd*;⁹⁷ *The Minister for Lands v Ricketson and the Australian Mortgage, Land & Finance Co*;⁹⁸ *Short Bros., Ltd v Commissioners of Inland Revenue*;⁹⁹ *Stebbing v Metropolitan Board of Works*;¹⁰⁰ *Van Den Berghs, Ltd v Clark*.¹⁰¹

They found that most of the cases did not relate to the distinction between breeding stock as a capital asset and other animals held for the purposes of sale and therefore revenue assets, but rather focussed on the receipt of insurance or compensation monies to be considered as assessable income. They suggested that:

It may be that the Wade Case focused on insurance recoveries as assessable income and substituted monies received by way of insurance recoveries as an effective sale of livestock, instead of considering the distinction between breeding stock and trading stock.¹⁰²

Additionally, they also considered a number of other cases which they considered relevant to the Wade Case but not used in evidence by either party. Significantly, they examined the findings of *Robinson v Federal Commissioner of Taxation* ('*Robinson Case*')¹⁰³ and found that it focused on the sale of sheep in conjunction with the sale of a pastoral property. It was:

Held, that the ewe weaners were not "trading stock" within the definition of that term in sec. 4 of the *Income Tax Assessment Act 1922-1925*, and therefore that the proceeds of the sale of such ewe weaners were not assessable income of the owner under sec. 17 (1) of that Act.¹⁰⁴

They stated that:

The *Robinson Case* of 1927 supports the distinction but the later Wade Case of 1951 does not. It may be that if the *Robinson Case* had been considered by their Honours in Wade, then the outcome may have been different.¹⁰⁵

As the *Robinson Case* of 1927 found the opposite of the Wade Case of 1951 – that there **is** a distinction between animals held in a business of primary production and that some are not trading stock, this research examined the amendments to income tax legislation that may have occurred in the period between 1927 and 1951. It was found that s 17, referred to in the *Robinson Case*, had been repealed in 1936. Accordingly, s 17 of the *Income Tax Assessment Act 1922-34* (ITAA 1922) is examined in detail in the following section of this paper.

⁹⁴ (1944) 7 ATD 333.

⁹⁵ [1949] HCA 27; (1949) 78 CLR 504.

⁹⁶ [1929] UKHL TC 14 364 (22 February 1929).

⁹⁷ (1937) AC 610.

⁹⁸ (1898) 19 LR NSW 281.

⁹⁹ (1927) 12 TC 955.

¹⁰⁰ (1870) LR 6 QB 37.

¹⁰¹ (1935) AC 431, 19 TC 390.

¹⁰² Fullarton and Pinto (n 10) 135.

¹⁰³ [1927] HCA 8; (1927) 39 CLR 297 (*Robinson Case*).

¹⁰⁴ *Robinson Case*, 297.

¹⁰⁵ Fullarton and Pinto (n 10) 135.

F Section 17 – The Forgotten Story

This paper focuses on the ATO's view that *all* livestock held in a business of primary production are trading stock and therefore the fiscal transactions are a form of revenue according to ordinary concepts and subject to income tax. The ATO supports that view with the reported findings of the 1951 *Wade Case*.¹⁰⁶ The matter of accounting for stud or breeding stock was previously examined by Fullarton and Pinto¹⁰⁷ and the findings of the *Wade Case* was further examined by them in detail.¹⁰⁸ This paper has examined the sequence of events and documents from the lodgement of Wade's 1948 income tax return to the final appeal by the Commissioner to the Full Bench of the High Court in 1951 to investigate if the ATO's view is truly supported by the findings of the *Wade Case* or if that opinion might be successfully challenged.

Fullarton and Pinto conclude that significant changes to taxation law have occurred over the past 70 years and that the *Wade Case* may no longer be a concrete foundation to the view that breeding or stud stock should not be treated as capital assets or aids to manufacture rather than goods held for re-sale. This, and the preceding papers, indicate that while the ATO opinion, which relies entirely on the *Wade Case* might be unfounded further research, beyond the scope of this analysis, reveals the ATO view is correct. They found previously that earlier cases, such as the *Robinson Case*¹⁰⁹ of 1927, held that breeding or stud stock were capital assets and therefore not subject to income tax provisions. However, in the *Wade Case* of 1951 it was inferred that livestock were considered to be trading stock. Had there been a significant a change to the legislation in the period 1927 and 1948? The Statement of reasons for the decision of the Board of Review¹¹⁰ provides the clue. In that statement the Board refers to the consistency of the provisions between the ITAA 1922, and the following *Income Tax Assessment Act* (Cth) 1936 (ITAA 1936). In that statement the Board referred to s 50 of the 'old' act and ss 51 and 51A.

However, there may have been inconsistencies. This research compared the two acts and it was found that section 17 is contained in the ITAA 1922, but not in the following ITAA 1936. Section 17 of the ITAA 1922 contained the following provision:

(4.) In this section— (a) the expression "trading stock" does not include live stock which in the opinion of the Commissioner, Assistant Commissioner or Deputy Commissioner are ordinarily used as beasts of burden or as working beasts or for breeding purposes;¹¹¹

Section 17 expressly identified breeding stock as NOT being trading stock. However, s 17 was deleted from the ITAA 1936 and consequently its repeal brought *all* animals used in primary production into the livestock trading account. This paper suggests therefore, that while the basis for the view might be challenged, the ATO view is correct. Had the assessor and the accountant known of the repeal of s 17 then the *Wade Case* would never have existed. The

¹⁰⁶ Lendon (n 2).

¹⁰⁷ Fullarton and Pinto (n 1).

¹⁰⁸ Fullarton and Pinto (n 10).

¹⁰⁹ *Robinson Case*, 297.

¹¹⁰ *Commissioner of Taxation v Wade* (n 23) 58.

¹¹¹ *Income Tax Assessment Act 1922* (Cth) s 17.

ATO could simply have pointed that out to the taxpayer; the board of review; the High Court and so on. It appears the repeal of s 17 became lost in history. In fairness the 1930s and 1940s were tumultuous years for Australia and the World in general. The events of The Great Depression and World War II might have overshadowed the transition of the income tax legislation from the ITAA 1922 to the ITAA 1936. There were also the challenges of the Uniform Tax Cases to help confuse accountants and tax administrators alike.

Detailed examination of the Ferguson Royal Commission on Taxation 1934¹¹² is not conducted here but the brief relevant details as to why it was recommended to repeal s 17 outlined here. The Royal Commission considered arguments made by various Associations of graziers to continue the exemption from income tax for transactions relating to the purchase and sale of breeding stock but found that

The claim [by the associations that the sale of breeding stock should not be included in assessable income] is based upon the argument that live stock used for breeding purposes is equivalent to plant, and that when it is sold the proceeds should be regarded as a realization of capital. But the grazier does not take this view when he buys it, for the cost is debited to his working account, and he is allowed a deduction in full for the amount so expended. If breeding stock is sold otherwise than upon the realization of a business, the proceeds are brought to account as ordinary income, and the grazier is taxed on the profit or allowed for the loss on the transaction. If the argument that breeding stock is capital be sound, it should be treated consistently in all circumstances, and in that event its cost would not be allowed as a deduction, nor would any profit on its realization be taxable.

The truth is that live stock possesses some of the characteristics both of a fixed asset and a trading asset. Although as animal may be acquired primarily for breeding or wool-growing purposes, its ultimate sale in many cases by no means a minor consideration. The life of any stock is limited to a few years, and must eventually be realized or replaced.¹¹³

Although the argument that the assets must be eventually realized or replaced might apply to all capital assets, the dual characteristics of animals in that they can carry out the functions of breeding stock and trading stock simultaneously is considered unique to biological assets, therefore, the Commission's rationale is difficult to refute. Accordingly, the Royal Commission made the following recommendation:

We recommend that the proceeds of breeding stock sold upon the realization or discontinuance of a business from any cause whatever shall be included in the assessable income of the taxpayer.¹¹⁴

We recommend that Section 17 of the Commonwealth Income Tax Assessment Act, which permits the purchaser of sheep in the wool to treat the cost as a purchase of sheep and wool as distinct from each other, be deleted from the Act.¹¹⁵

The explanatory memorandum put to Parliament did not provide as much detail as that contained in the report but rather simply stated that the following definition of 'Live stock'

¹¹² Commonwealth, *Royal Commission on Taxation (1932-34)* (Ferguson Royal Commission Report).

¹¹³ *Royal Commission on Taxation* (Third Report, 12 April 1934) 135.

¹¹⁴ *Ibid.*

¹¹⁵ *Ibid.*, 136.

does not include animals used as beasts of burden or working beasts in a business other than a business of primary production.¹¹⁶ That definition reflects the repeal of s 17 which had made the distinction between breeding stock and stock held for resale. It is assumed ‘working beasts’ referred to animals used to produce products for sale, that is growing wool, producing fat lambs or milk. The following footnote was added to the Explanatory Memorandum for clarification as to why the definition was to be included in the legislation:

(e) This definition continues the existing Commonwealth practice except in regard to live stock used as working beasts and beasts of burden by primary producers. In their case, the difficulty of identifying these animals and also the necessity of accounting for any sale of the possible natural increase, make it desirable in the interests of simplicity to bring working beasts and beasts of burden into the live stock schedule.¹¹⁷

It is noted that the reason for the removal of s 17 provided in the Royal Commission report – that is the inability to treat the value of the sheep (a capital asset) distinctly from its wool (a revenue asset) was not contained in the explanatory memorandum. Section 17 was duly omitted from the ITAA 1936 and therefore all animals used in a business of primary production became classified as trading stock regardless of the function those various animals carried out. It is on that basis that the ATO should place its support for its view and not the findings of the Wade Case, which as discussed, might be challenged.

Discussion of how breeding stock could be accounted for, other than being included in the general category of livestock, is beyond the scope of this paper. However, Allen has considered the concept in detail and concludes that:

The tax community should be aware of how the present system for taxing live stock came about and, in particular, why the current valuation methods were avoided for so many years. When the current system fails, a better one will be needed based on sound logic and analysis.¹¹⁸

It might also be noted that an aging merino ewe, used for growing wool and producing merino lambs for wool production, might be sent to the abattoirs at the end of her ‘useful life’ but to consider her and a dorper fat lamb bred specifically for the prime lamb meat market to be synonymous might reveal a simplistic view of the pastoral industry. That discussion might be considered in future research.

III SUMMARY AND CONCLUSION

This paper argues that rulings and determinations issued by the ATO should not be considered by tax practitioners as always providing for greater clarity and certainty in the preparation and lodgement of taxation returns and the payment of tax. It notes that tax agents are bound by

¹¹⁶ Explanatory Memorandum, Bill for an Act to Consolidate and Amend the Income Tax Assessment Act 1922-1934, 1935 (Cth) 8.

¹¹⁷ Ibid 9.

¹¹⁸ Christina Allen, ‘Taxation of Live Stock in Australia: A critical review of Tax Law and Policy’ (2020) 49(3) *Australian Law Review* 209, 231.

law to take reasonable care to ensure that taxation laws are applied correctly to the circumstances in relation to which they are providing advice to a client¹¹⁹ and accordingly it asserts that agents should not simply accept the ATO view on a matter as necessarily representing the correct view of an issue. Significantly, it notes that the ATO is not directly responsible for the mistaken belief that rulings and advice given by it provides irrefutable grounds for a particular view or interpretation of tax law. While the ATO may provide guidance on its view, those opinions clearly include a caveat that its opinion may be not be correct. Its written opinions generally include a specific disclaimer which states:

If this advice turns out to be incorrect and you underpay your tax as a result, you will not have to pay a penalty. Nor will you have to pay interest on the underpayment provided you reasonably relied on the advice in good faith. However, even if you don't have to pay a penalty or interest, you will have to pay the correct amount of tax.¹²⁰

To illustrate its argument the paper uses the case of livestock held in a business of primary production. Previously, Fullarton and Pinto argued that animals kept held for stud or breeding purposes should be considered capital assets and the proceeds of sale of those assets should be subject to capital gains tax provisions and concessions.¹²¹ However, they found that the ATO considered *all* animals held in a business of primary production were held for the purpose of sale and that the proceeds were subject to income tax regardless of their primary function.

On investigation Fullarton and Pinto found that the word *all* was not contained in legislation but rather the ATO relied on the findings of the Wade Case to support its view. They found that that view remained unchallenged for over 70 years when they conducted their subsequent investigation of the Wade Case.¹²² Their investigation focused on the reported findings of the Wade Case which revealed their Honours had used the inference that all livestock were trading stock to reach their findings. They discovered the findings of the Wade Case was not as conclusive as the ATO view suggested, and that in particular, Kitto J was reluctant to accept that principle, but he focussed instead on the concept of insurance recoveries and the costs of repairs to support his findings.¹²³

Therefore, based solely on the reported findings of the Wade Case, Fullarton and Pinto¹²⁴ found that sufficient doubt existed to suggest the Commissioner's view might not be reliably supported by the findings of the Wade Case. Rather, they supported the argument that some animals held in a business used for primary production, such as horses and dogs used for mustering and stud stock used for breeding, or the production of animal products, such as milk or wool, are of a capital nature and should be treated accordingly for taxation purposes.

Fullarton and Pinto's argument however did not reveal the background to the Wade Case which may have consolidated or refuted the ATO view that left the matter open for further research. The subsequent research supporting this paper reveals the reason why it was inferred that all animals held in a business of primary production are considered trading stock. It is not the

¹¹⁹ Code of Professional Conduct *Tax Agent Services Act 2009* (Cth) s 30-10.

¹²⁰ Lendon (n 2).

¹²¹ Fullarton and Pinto (n 1) 68.

¹²² Fullarton and Pinto (n 10).

¹²³ *Ibid.*

¹²⁴ Fullarton and Pinto (n 10) 121.

findings of the Wade Case, as suggested by the ATO advice, but rather the operation of the Law.

In 1934, the section of the ITAA 1922-34 that segregated breeding stock from live stock held for trading purposes was repealed.¹²⁵ This paper reveals that the impact of that change in the legislation brought Wade's dairy cattle into his live stock schedule as assessed by the Commissioner of Taxation. This research reveals that Wade appealed firstly to the CTRB and then to a single judge of the High Court (Kitto J). His appeal was based on the distinction between animals held for production purposes and therefore should be considered as capital assets, but while the distinction of his dairy cattle being a means of production – a capital asset, and not a product for sale – a revenue asset, s 17 was not considered in any evidence provided to the CTRB or the High Court. Section 17 expressly identified breeding stock as NOT being trading stock. However, s 17 was omitted from the ITAA 1936 and consequently its omission brought *all* animals used in primary production into the livestock trading account. This paper suggests therefore, that while the basis for the view might be challenged, the ATO view is correct. However, it appears the repeal of s 17 became lost in history. In fairness the 1930s and 1940s were tumultuous years for Australia and the World in general. The events of The Great Depression and World War II might have overshadowed the transition of the income tax legislation from the ITAA 1922 to the ITAA 1936. There were also the challenges of the Uniform Tax Cases to help confuse accountants and tax administrators alike.

The conclusion of this paper is that had the assessor and the accountant known of the repeal of s 17 then the Wade Case would never have existed. The ATO could simply have pointed that out to the taxpayer; the board of review; the High Court and so on. This paper acknowledges that to research every matter of precedent reported and used in the courts to the level conducted in this research would be an unrealistic expectation for tax preparers, legal practitioners and the courts to conduct it does highlight the need to independently research the background of similar cases. This paper points to the statutory requirement that tax agents are duty bound to take reasonable care to ensure that taxation laws are applied correctly to the circumstances in relation to which they are providing advice to a client¹²⁶ and in that context, it asserts that agents should not simply accept the ATO view on a matter as necessarily representing the correct view of an issue.

IV SUGGESTED FURTHER RESEARCH

This paper finds that the consideration that all animals held in a business of primary production in Australia are classified as trading stock is a matter of taxation legislation. That was not always the case. Prior to its repeal in 1934, s 17 of the *ITAA 1922-34* provided that breeding stock were considered capital assets. The basis of Wade's omission of the transactions relating to the destruction and replacement of his dairy cattle was that it was argued that the cattle were not trading stock, but rather aids to manufacture and therefore 'purely a capital transaction', as noted in his 1948 Income Tax Return.

¹²⁵ *Income Tax Assessment Act 1922* (Cth) s 17.

¹²⁶ Code of Professional Conduct *Tax Agent Services Act 2009* (Cth) s 30-10.

Fullarton and Pinto also argued that breeding stock should be treated as capital assets. They pointed to the efflux of time, the recommendations of the Asprey Report¹²⁷ and the introduction of capital gains tax in 1985 as factors to reconsider some live stock as capital assets rather than trading stock regardless of their function in the business. The 1934 Ferguson Royal Commission on Taxation recommended the repeal of s 17 of the ITAA 1922-34 to simplify the distinction between live stock as capital assets and their product as revenue assets. However, the basis for the recommendation was not the difficulty is distinguishing stud sheep from market sheep but rather the difficulty in distinguishing the sheep from its wool.¹²⁸ That detail was omitted from the explanatory memorandum given in the Bill to enact the ITAA 1936.

Therefore, while it is accepted that all animals held in a business of primary production are considered trading stock by operation of the legislation, the matter as to why breeding stock, and other animals held as aids to manufacture should not be regarded as capital assets remains. It is inequitable that retiring farmers, pastoralists and graziers should pay significantly more tax on the proceeds of the sale of their businesses than other business owners do on the sale of their capital assets due to their breeding or stud animals being regarded as trading stock by operation of the law. This paper suggests that the repeal of s 17 should be investigated and researched such that the situation argued by Wade, and addressed by statute prior to 1934, be reinstated and accounted for using modern electronic data processing systems and accounting procedures to permit the distinctions to be effectively returned to farmers, pastoralists and graziers for taxation purposes. What may have been complex in 1934, may be simplified in the 21st Century.

¹²⁷ Taxation Review Committee, The Parliament of the Commonwealth of Australia, *Full Report* (Parliamentary Paper No 136, January 1975) (Asprey Report).

¹²⁸ *Royal Commission on Taxation* (Third Report, 12 April 1934) (Ferguson Report) 135.